(9)

No. 92-1482-CMY
Status: GRANTED

Docketed:
March 12, 1993

See also:

Title: Eric J. Weiss, Petitioner
v.
United States
and
Ernesto Hernandez, Petitioner
v.
United States

Court: United States Court of Military Appeals

Counsel for petitioner: Morrison,Alan B.

Counsel for respondent: Solicitor General

No. 68237/MC, Ernesto Hernandez v. United States, USMIL affirmed 2-25-93.

Entry	Date	Note	Proceedings and Orders
1	Mar 12 1993	G	Petition for writ of certiorari filed.
2	Apr 12 1993		Brief of respondent United States in opposition filed.
3	Apr 14 1993		DISTRIBUTED. May 14, 1993
4	Apr 21 1993	X	Reply brief of petitioner filed.
14	Apr 21 1993		* Also filed in 92-1102.
6	May 17 1993		REDISTRIBUTED. May 21, 1993
7	May 24 1993		Petition GRANTED.
			**********
8	Jun 16 1993	G	Motion of petitioners to dispense with printing the joint appendix filed.
9	Jun 28 1993		Motion of petitioners to dispense with printing the joint appendix GRANTED.
10	Jul 8 1993		Brief of petitioners Eric Weiss and Ernesto Hernandez filed.
11	Jul 8 1993		LODGING consisting of eighteen copies of four separate documents received from counsel for the petitioners
12	Jul 8 1993		Brief amicus curiae of United States Air Force Appellate Defense Division filed.
13	Jul 8 1993		Brief amicus curiae of American Civil Liberties Union, et al. filed.
15	Aug 2 1993		Record filed.
		*	Certified record United States Court of Military Appeals and United States Navy (Expanding Folder).
16	Aug 9 1993		Brief of respondent United States filed.
17	Sep 7 1993		Reply brief of petitioners filed.
18	Sep 8 1993		CIRCULATED.
19	Sep 10 1993		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 3, 1993.(1ST CASE).
20	Nov 3 1993		ARGUED.

92-1482

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ERIC J. WEISS & ERNESTO HERNANDEZ,
Petitioners,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), is reprinted as Appendix A at Pet. App. 1a. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at Pet. App. 86a. The unpublished decision of the United States Court of Military Appeals in *United States v. Hernandez*, No. 68237/MC (C.M.A. Feb. 25, 1993) is reprinted as Appendix C at

Pet. App. 88a. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, in *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1922) is reprinted as Appendix D at Pet. App. 89a.

JURISDICTION

On December 21, 1992, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Weiss*. On February 25, 1993, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Hernandez*. Jurisdiction in this Court is based on 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Articles 6, 16, 26, 37 and 66, 10 U.S.C. §§ 806, 816, 826, 837, and 866, are set forth in Pet. App. at 92a.

STATEMENT OF THE CASE

This petition raises two closely related questions which go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions. All military trial judges and almost all appellate military judges are commissioned officers and lawyers on active duty in their services. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges. Instead, military judges are selected and appointed by the Judge Advocates General of their service, who is the senior uniformed lawyer in each armed service in charge of all military legal personnel, and who is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice art. 6(a), 10 U.S.C. § 806(a) (1988). Moreover, the Judge Advocates General who appoint military judges have absolute and unreviewable discretion to remove or transfer them out of their judicial assignments, and those judges lack protection if their decisions do not suit their Judge Advocate General. Accordingly, the method of appointment to judicial service in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. *Institutional Framework.*

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five judges appointed from civilian life by the President with the advice and consent of the Senate for fixed terms. Uniform Code of Military Justice art. 142, 10 U.S.C.A. § 942 (West Supp. 1992). The appointments and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are 35 appellate military judges, who may be either military officers or civilians, all of whom are appointed by the Judge Advocate General of their service. In addition, for the Navy-Marine Corps Court of Military Review, where petitioners' cases were heard, the Navy Judge Advocate General signs and submits the judges' annual fitness reports, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although these courts are permanent courts, located in the Washington, D.C. area, none of the judges is appointed to a fixed term of office. Uniform Code of Military Justice art. 66(a), 10 U.S.C. § 866(a) (1988). Nine appellate judges, all military officers, sit on the Navy-Marine Corps Court of Military Review, but most cases, like petitioners', are decided by three-member panels. The Navy-Marine Corps Court, like those of the other services, has detailed rules to manage and regulate its docket and the attorneys who practice before it. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement of one year or more, a dismissal, or a bad-conduct or dishonorable discharge is adjudged. Uniform Code of Military Justice art. 66(b), 10 U.S.C. § 866(b) (1988).

Military trial judges preside at special courts-martial and, if qualified, at general courts-martial.[1] Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, their selection and appointment as a judge is made by the Judge Advocate General of their service. Like appellate judges, the trial

[1] Currently, there are a total of 95 judges from all of the services who are certified to preside at general courts-martial.

judges have no fixed terms of office. Uniform Code of Military Justice art. 26(a)-(c), 10 U.S.C. § 826(a)-(c) (1988). Naval trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who in turn reports to and is supervised by the Chief Judge of the Navy-Marine Corps Trial Judiciary.

Each armed force assigns military judges as and when it sees fit. Judges often serve a two- three- or four-year assignment. However, a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force.[2]

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done—the sole requirement is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or terms of years, total forfeiture of pay and allowances, and/or a dishonorable or bad-conduct discharge (or dismissal for officers). 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh*, 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months of confinement, and/or forfeiture of up to two-

[2] William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 14-31.00, at 518-19 (1991). The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls their actual duty assignments.

thirds pay per month for six months, and/or a bad-conduct discharge. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1988).

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Judge wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [the jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1988).

2. *The Petitioners.*

a. Petitioner Weiss pleaded guilty in a bench trial before the Honorable E. F. Pesik, sitting as a special court-martial. At the time of trial, Judge Pesik was a major in the United States Marine Corps, and was a general courts-martial certified judge and the Chief Judge of the Sierra Judicial Circuit. Weiss was found guilty of larceny (shoplifting of a $9.00 racquetball glove) in violation of Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1988). He was sentenced to three months of confinement, forfeiture of $1395.00 in pay, and separation from the naval service with a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion. *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992).

b. Petitioner Hernandez pleaded guilty in a bench trial before the Honorable H. K. Jowers, Jr., sitting as a general court-martial. At the time of trial Judge Jowers was a colonel in the United States Marine Corps, a certified general court-martial judge, and Chief Judge of the Mid-South Judicial Circuit. Hernandez was found guilty of possession, importation, and distribution of cocaine, in violation of Uniform Code of Military Justice art. 112a, 10 U.S.C. 912a (1988). This was his first offense, he had an otherwise good record, and he had cooperated with the authorities. Nonetheless, he was sentenced to 25 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay-grade, and separation from the naval service with a dishonorable discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion, *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1992). The Court of Military Appeals affirmed on February 25, 1993.

3. *Rulings of the Court of Military Appeals.*

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioners' claims that the manner in which the trial and appellate military judges in their cases were appointed violated the Appointments Clause of the Constitution, and that failure to appoint those judges to fixed terms of office denied petitioners liberty without due process. *See* Pet. App. 2a n.1. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss's Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. Petitioner Hernandez's case was affirmed on February 25, 1993.[3]

In order to garner three votes, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. Pet. App. 5a. This proposition was endorsed by four of the court's five judges. Pet. App. 21a, 36a, 77a.

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[3] A petition for writ of *certiorari* in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the Due Process issue. We note that the Court has recently requested a response in *Graf* after the Solicitor Generai had waived his right to reply

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968 and thus no new appointment was necessary. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" Pet. App. 8a.

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. And Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position in both its brief (Brief at 10) and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption to the strictures of the Appointments Clause based on the judges' status as military officers or military law-

years. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. Pet. App. 58a. (italics in original). He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of the entire Judge Advocate General's Corps from which military judges are chosen. Pet. App. 83a.

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C. area or for courts-martial like these that are held in peacetime.

REASONS FOR GRANTING THE WRIT

This petition seeks to establish minimum standards for the appointment of military judges and their retention in office for a fixed term. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause, are available to those tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violation would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

I. THE APPOINTMENTS CLAUSE VIOLATION

> Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Pet. App. 72a (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford, and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers, must be made by one of the authorities set forth in the Appointments Clause.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).[5]

[5] A predictable consequence of having appointments made by an intermediate official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is the homogeneity of the judges of the Courts of Military Review. Thus, none of the 35 current appellate judges is a woman, and two of the four

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied because all military judges are commissioned officers of the Armed Forces, having been nominated by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits—a Deputy Secretary of Defense could not simply move over to become the Assistant Attorney General for Antitrust or a Member of the Equal Employment Opportunity Commission—the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in 1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. Even if that assessment were correct, and petitioners agree with the dissenters that it is not, that would at most allow those who were in a judicial position in 1968 —the "incumbent[s]" in *Shoemaker*'s words (147 U.S. at 301)—to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers.

As a fall-back Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to persons who were already in offices to which they had been properly appointed. But there

appellate courts are comprised of white males. The only two civilians sit on the five-member Coast Guard Court.

would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker*'s "germaneness" test. The duties and powers of military judges, including all of those involved in petitioners' cases, are so different from those of prosecutor, defense counsel, or legal advisor to a command—which is what most military lawyers do before they become military judges—that there is not simply an addition of a related duty, as in *Shoemaker*, but a substitution of a new job, with entirely new functions, for an old one. Surely, no one would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on that Court without meeting the requirements of the Appointments Clause; the result should be no different for any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the ruling below. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is decisive in determining whether the Appointments Clause applies at all, and under that analysis there can be no question that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very least, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision below rests on even shakier ground because the decisive vote was cast by Judge Crawford. She implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale: that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the Armed Forces. Her ruling conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the Appointments Clause based on Congress's interest in, or plenary power over, particular subject areas. Judge Crawford's rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesale exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's ruling that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken the far more expansive route to affirming petitioner's convictions if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error—as it clearly seems to be—there were three votes to overturn petitioner's convictions, and it should be respondent, not petitioners seeking *certiorari*.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who practice in military court-

rooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocate General writes the annual fitness reports of the members of the Navy-Marine Corps Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the Due Process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

The validity of the appointment of military judges under the Appointments Clause is a significant constitutional question which the Court should address immediately. The 2-1-2 division within the Court of Military Appeals attests to the serious debate on the merits of the issues. A split in the circuits is unlikely ever to arise, because the question has been fully and fairly litigated and resolved by the military justice system, thus potentially insulating it from review on habeas corpus. *See generally, Watson v. McCoffer*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). In any event, as it did in *Freytag*, this Court should grant review now to resolve the dispute as promptly as possible.

II. THE DUE PROCESS VIOLATION

The reasons why this Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Non-compliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint

and remove military trial and appellate judges, yet he is also responsible for supervising the efficient working of the service's military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 U.S. 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioners believe that respect for state legislative judgments and concerns of federalism, which loom so large in *Medina*, have no place where federal Due Process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard we also note that the concerns about overturning specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces, *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review, which sit permanently in the Washington, D.C. area. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions—some of which

it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility for involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals fell woefully short of justifying a massive exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for the accused. The due process issue alone is sufficiently important to warrant plenary consideration by this Court, especially because the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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March 12, 1993

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,869
NMCM 89 4189

UNITED STATES,
Appellee,

v.

ERIC A. WEISS,
Private U.S. Marine Corps,
Appellant.

Argued Oct. 6, 1992

Decided Dec. 21, 1992

For appellant: *Commander Philip D. Cave*, JAGC, USN (argued); *Captain Dwight H. Sullivan*, USMC and *Lieutenant Franklin J. Foil*, JAGC, USNR (on brief).

For appellee: *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Colonel T.G. Hess*, USMC (on brief).

Amici Curiae on behalf of appellant: *Colonel Malcolm H. Squires, Lieutenant Colonel James H. Weise, Major James M. Heaton* (on brief)—For Defense Appellate Division, USA. *Robert B. Weintraub, Joan E. Goldberg, Todd Gaziano* (on brief)—For the Committee on Mili-

tary Justice and Military Affairs, Association of the Bar of the City of New York.

Amici Curiae on behalf of appellee: *Thomas E. Booth* (argued); *Robert S. Mueller* (on brief)—For the United States Department of Justice. *Lieutenant Commander Charles J. Bennardini* (argued)—For Appellate Government Division, USCG. *Colonel Richard L. Purdon, Lieutenant Colonel Jeffery T. Infelise, Captain Jane M.E. Peterson* (on brief)—For Appellate Government Division, USAF. *Colonel Dayton M. Cramer, Major Joseph C. Swetnam, Captain Donna L. Barlett, Captain Samuel J. Smith, Jr.* (on brief)—For Government Appellate Division, USA.

Opinion

GIERKE, Judge:

A military judge sitting as a special court-martial convicted appellant, consistent with his pleas, of stealing a racquetball glove from the base exchange, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 921. The approved sentence provides for a bad-conduct discharge, confinement and partial forfeitures for 3 months. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated January 31, 1992.

This Court granted review of the following issue: [1]

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[1] We also granted review of the following issue:

WHETHER THE COURT-MARTIAL WHICH TRIED THIS CASE HAD JURISDICTION WHERE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW HAD POWER TO REVIEW AND AFFIRM THIS CASE WHERE ITS JUDGES WERE NOT APPOINTED TO A FIXED TERM OF OFFICE.

This issue was resolved adversely to appellant in *United States v. Graf*, 35 MJ 450 (CMA 1992).

WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

Appellant argues that military judges must be nominated by the President and confirmed by the Senate as military judges. The Government argues that military judges already have been nominated and confirmed as military officers, that military officers traditionally have performed judicial duties, and that military officers need not receive an additional appointment to perform judicial duties. We hold that the Constitution does not require that a military officer who meets the qualifications of Article 26, UCMJ, 10 USC § 826, receive a second appointment to perform the duties of a military judge. Likewise, we hold that a military officer meeting the qualifications of Article 66, UCMJ, 10 USC § 866, need not receive a second appointment to perform the duties of an appellate military judge.

I. Appointment of Officers of the United States

Article II, § 2, para. 2, clause 2 of the Constitution—the Appointments Clause—provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment

> of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The purpose of the Appointments Clause is twofold: (1) it protects the prerogative of the President from congressional encroachment on his power to appoint his subordinates; and (2) "it limits the universe of eligible recipients of the power to appoint." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991). Appellant argues that this second purpose, a limitation on the power to appoint, is violated by Articles 26 and 66 because they vest the appointment power in the Judge Advocate General rather than the President, the Courts of Law, or the head of a department.

The first question we must address is whether the Appointments Clause is applicable to the military justice system. Government counsel have not disputed this applicability of the Appointments Clause. Counsel for the United States Coast Guard, appearing as amicus curiae, argue that the Appointments Clause does not apply to the military justice system because that system is created pursuant to the plenary power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and that the Supreme Court grants great deference to Congress in the exercise of that power. *See United States v. Kovac*, 36 MJ 521, 522-23 (CGCMR 1992); *United States v. Prive*, 35 MJ 569, 573-77 (CGCMR 1992).

We agree that "[j]udicial deference . . . is at its apogee" when the authority of Congress to govern the land and naval forces is challenged. *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987). Nevertheless, congressional authority to raise, support, and govern the armed forces is separate from the authority to appoint Officers of the United States. Judicial deference is granted only to the

former, a legislative power conferred by Article I of the Constitution. The appointment of Officers of the United States is an Executive power, conferred by Article II and controlled by the Appointments Clause, from which the armed forces are not exempt, either expressly or by implication.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court held that the plenary power of Congress over federal election practices did not exempt members of the Federal Election Commission from the Appointments Clause. The Supreme Court explained:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. at 132, 96 S.Ct. at 688. Thus, we are compelled to conclude that, while Congress may determine how the military justice system will operate, it may not exempt those who will operate it from the Appointments Clause. Accordingly, we hold that the Appointments Clause is applicable to the military justice system.

The next question is whether the duties imposed on military judges by Articles 26 and 66 must be performed by an Officer of the United States, as that term is used in the Appointments Clause. Appellant contends, and we agree, that judicial duties may be performed only by "Officers of the United States," appointed in a manner consistent with the Appointments Clause. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764

(1991) (special trial judges of Tax Court); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931) (United States commissioners). *See also Buckley v. Valeo*, 424 U.S. at 126, 96 S.Ct. at 685 ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed" in accordance with the Appointments Clause.).

All military trial judges and most appellate military judges are commissioned officers of their respective armed forces. Commissioned officers of the armed forces are "Officers of the United States." *See Wood v. United States*, 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883). All regular officers of the military services are appointed by the President and confirmed by the Senate. *See* 10 USC § 531; *see also* 14 USC §§ 211 and 212 regarding appointment of regular Coast Guard officers. Reserve officers above the grade of major/lieutenant commander are appointed by the President and confirmed by the Senate. *See* 10 USC §§ 593 and 5912. Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade 0-3. *See* 10 USC § 624 (promotion of active-duty regular and reserve officers of the Army, Air Force, Navy, and Marine Corps).

If judicial duties may be performed only by Officers of the United States, and military officers are Officers of the United States, the next question is whether military officers may perform judicial duties without a new "judicial" appointment. In *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court had occasion to consider the nature and scope of the office held by military officers. The Supreme Court held that two military officers, the Chief of Engineers and the Engineer Commissioner for the District of Columbia, did not require second appointments as members of a commission created by Congress to select land for Rock Creek Park in the District of Columbia, survey it, map

it, and determine the just compensation to be paid by the United States upon its condemnation. Justice Shiras explained:

> As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate.

He went on to define "germane" broadly, observing:

> It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. *Wales v. Whitney*, 114 U.S. 564, 569 [5 S.Ct. 1050, 1052, 29 L.Ed. 277 (1885)]; *Smith v. Whitney*, 116 U.S. 167, 179, 181 [6 S.Ct. 570, 576, 577, 29 L.Ed. 601 (1886)]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391.

Appellant argues that "the offices already held by them" were the specific offices of Chief of Engineers and Engineer Commissioner for the District of Columbia, and not the underlying office of military officer. A careful reading of *Shoemaker* requires that we reject that argument for two reasons. First, *Shoemaker* specifically referred to "the duty which the *military officers* . . . were called upon to perform." (Emphasis added.) Second, the two cases cited in *Shoemaker* both dealt with the scope of military duties in general, not the specific duties of the

positions held by the military officers. *Wales* addressed the question whether the medical duties of the Navy Surgeon General were "military" as opposed to "civil" duties. *Smith* addressed the issue whether the fiscal duties of the Navy Paymaster-General were of a civil or military nature.

The principle we glean from *Shoemaker* is that Congress may create a new office (*e.g.*, Rock Creek Park Commissioner) and give a military officer the duties of that office without making a new appointment necessary, if the new duties are "germane" to the military duties of that officer. Applied to this case, it means that a second "judicial" appointment is not required if: (1) Congress did not create a new "office"; or (2) Congress created a new office, but the duties of that office are "germane" to the duties of the military officer detailed to perform them. A second appointment would be required if Congress created a new office and the duties of that office were not germane to the duties of the military officer detailed to perform them.

II. Military Judges

A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished. *See* Arts. 22, 23, and 24, UCMJ, 10 USC §§ 822, 823, and 824, respectively (prescribing who may convene courts-martial). Its constitutional origin is based on the congressional authority to govern the armed forces set out in Article 1, § 8, clause 14. As Colonel Winthrop explains, "Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.'" W. Winthrop, *Military Law and Precedents* 49 (2d ed. 1920 Reprint).

Military judges perform duties prescribed by statute and the executive order when detailed to a specific court-martial. *See* Art. 26; Exec. Order No. 12473, April 13, 1984, 49 Fed.Reg. 17,152 (promulgating the new Manual for Courts-Martial); RCM 801-1011, 1102, 1104, Manual for Courts-Martial, United States, 1984. Military judges have no inherent judicial authority separate from a court-martial to which they have been detailed. When they act, they do so as a court-martial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade and rank. To the extent that they perform judicial duties such as authorizing searches and reviewing pretrial confinement, their authority is not inherent but is either delegated or granted by executive order. *See* Mil.R.Evid 315(d)(2), Manual, *supra* (military judge may authorize searches *if* authorized by regulations of Secretary of Defense or Secretary concerned); RCM 305(g) (military judge may release from confinement); RCM 305(i)(2) and RCM 305(j) (military judge may review propriety of pretrial confinement).

To resolve the granted issue with respect to military judges, we must answer two questions: (1) Did Article 26 create a new office of "military judge"?; and (2) If so, are the duties of the new office germane to the duties of the military officer detailed as a military judge of a general court-martial or special court-martial?

A. New Office

After examining the history and evolution of the military judge, set out in greater detail below, we conclude that Congress did not create a new "office" when it enacted: the Articles of War (AW) in 1920 (requring that a "law member" be detailed to every general court-martial—AW 8); or the Uniform Code of Military Justice of 1950 (requiring detail of a "law officer" to every general court-martial—Art. 26, 50 USC § 590); or the Uniform Code of Military Justice of 1968 (redesignating

the law officer as the military judge—Art. 26, 10 USC § 826).

As the position of military judge has evolved, the military judge has acquired virtually all the duties previously performed by the president and members of a court-martial. Prior to the 1920 amendments to the Articles of War, the president of a court-martial, who usually was not a lawyer, presided over the trial. *See* para. 89, Manual for Courts-Martial, U.S. Army, 1917. In 1920, AW 8 was amended to require that a "law member" be detailed to general courts-martial in the Army. 41 Stat. 787, 788. AW 31 was amended in 1920 to transfer some duties of the president to the law member. It also provided that the law member ruled finally on questions of admissibility of evidence but could be overruled by a majority of the court members on other interlocutory questions. Until 1951, the Navy and Coast Guard continued the pre-1920 practice of using non-lawyers to preside over courts-martial and decide interlocutory questions. *See* §§ 381 and 370, Naval Courts and Boards, 1937; para. 385(t), Manual for Courts-Martial, U.S. Coast Guard, 1949 at 134.

When the Uniform Code of Military Justice, Pub.L. No. 81-506, 64 Stat. 108, codified in 50 USC §§ 551-736, recodified in 10 USC §§ 801-940 (1956), became effective in May 1951, the law member was redesignated as the law officer and additional duties were transferred from the president of the court to the law officer. All military services were required to "appoint" a law officer to general courts-martial. *See* Art. 26. Nonlawyers continued to preside over special courts-martial, Art. 51, UCMJ, 50 USC § 626, recodified in 10 USC § 851 (1956). This changed when the Military Justice Act of 1968, Pub.L. No. 90-632, § 2(9), 82 Stat. 1335, 1336, became effective in August 1969.

The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his

stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82 Stat. 1336. Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.[2] As the Supreme Court explained in *Shoemaker*, "It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." 147 U.S. at 301, 13 S.Ct. at 391.

The Military Justice Act of 1968 also amended Article 16, UCMJ, 10 USC § 816, to authorize an accused to request trial by a court-martial composed of only a military judge. 82 Stat. 1335. When trying a case without members, the military judge sits as a one-member court-martial. A one-member court-martial was not new to military justice. *See* Art. 16(3), UCMJ, 50 USC § 576 (1950), recodified in 10 USC § 816(3) (1956) (summary court-martial); AW 7 (1916) (summary court-martial); Art. 64(b), Articles for the Government of the Navy (AGN) (1909) (deck court). When sitting as a one-member general court-martial or special court-martial, the military judge's authority is derived from the court-martial to which he is detailed, not from his status as a military judge. His authority is limited to that of the court-martial to which he has been detailed, and he may act only with respect to the cases referred to that court-martial. We conclude that the amendment of

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[2] In *United States v. Graf, supra,* this Court said, in dicta, *id.* at 455, that Congress "created" the military judge and the Courts of Military Review by enacting the Military Justice Act of 1968. We did not intend this imprecise dicta to hold that Congress created a new "office" in 1969, when the Act became effective.

Contrary to a dissenter's assertion that this view demeans military judges at 260 (Wiss, J., dissenting), we believe that our opinion merely recognizes the awesome life-and-death authority traditionally entrusted to military officers.

Article 16 did not create a new office but merely altered the composition of general courts-martial and special courts-martial.

Likewise, the amendment of Article 39(a), UCMJ, 10 USC § 839(a), effective in 1969, authorizing the military judge to hold sessions outside the presence of the members to dispose of interlocutory motions, arraign the accused, receive pleas, and dispose of other procedural matters not requiring the presence of the members, did not create a new office. The purpose and effect of Article 39(a) was to avoid wasting the time of the members by requiring them to sit idly by while the military judge disposed of legal and procedural issues. S.Rep. No. 1601, 90th Cong., 2d Sess. 10 (1968), U.S.Code Cong. & Admin. News 1968, 4501. Article 39(a) did not confer new duties on the military judge; it merely authorized him to discharge those duties without wasting the time of the court members.

Since a new office was not created by the Military Justice Act of 1968, a second "judicial" appointment was not necessary for military judges. Accordingly, we hold that the military judge in appellant's case was not appointed in violation of the Appointments Clause.

B. Germane Duties

Assuming, *arguendo*, that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer. *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361. Just as the duties of a Rock Creek Park Commissioner were germane to the duties of a military engineer, presiding over courts-martial is clearly germane to the duties of a military lawyer. Accordingly, a new appointment would not be required even if a new office was created.

III. Appellate Military Judges

In order to resolve the granted issue with respect to appellate military judges, we must address three questions: (1) Did Congress create a new office?; (2) If Congress created a new office, are the duties of that office germane to the duties of the military officer detailed to perform them?; and (3) What is the significance of the provision in Article 66(a) authorizing civilian members on boards of review and their successors, the Courts of Military Review?

A. New Office.

Appellant contends that Congress established a new office by creating an intermediate appellate court for each service. We hold that a new office was created when boards of review were established.

Prior to 1920, there were no appellate military courts. Appellate review of courts-martial was accomplished by a hierarchy of reviewing, supervisory, and confirming authorities, all of whom were military commanders, cabinet officers, or the President. In 1920, the Articles of War, applicable only to the Army, were amended by enactment of AW 50½, which mandated: "The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department." The board of review was required to examine every record of trial involving a sentence which required "approval or confirmation by the President." Furthermore, "execution of any . . . sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary," required review by the board of review and the Judge Advocate General. If the Judge Advocate General disagreed with the decision of the board of review, the record would be transmitted to the Secretary of War for the action of the President. AW 50½. On the other hand, special courts-martial and summary courts-martial

were reviewed only by the officer appointing the court. AW 36 (1920). After the 1948 amendments of the Articles of War, effective February 1, 1949, certain Army and Air Force general court-martial cases were reviewed by a board of review, a Judicial Council composed of three general officers of the Judge Advocate General's Corps, and the Judge Advocate General. *See* AW 50 (1948).

Prior to 1951, a Navy general court-martial was reviewed by "the commander of the fleet or officer ordering the court." 53d AGN (1934). A summary court-martial (the counterpart of the modern special court-martial) was reviewed "by the officer ordering the court . . . and by his immediate superior in command." 32d AGN. A sentence "extending to the loss of life, or to the dismissal of a commissioned or warrant officer" required confirmation by the President. 53d AGN. A deck court (the counterpart to the modern summary court-martial) was reviewed by the officer who ordered it. AGN 64(d). Reviewing authorities were required to examine jurisdictional issues, the legal sufficiency of the pleadings, objections to evidence, and the legal sufficiency of the evidence. *See, e.g.*, § 472, Naval Courts and Boards, 1937.

Prior to 1951, a Coast Guard deck court was reviewed "by the officer ordering" it and then was forwarded to Coast Guard Headquarters, where it was "reviewed for legality . . . with the same force and effect as though an appeal had been taken." The Commandant of the Coast Guard was authorized to take whatever action "the interests of justice and equity may require." The accused had a "right to appeal to the Secretary of the Treasury from a decision of a deck court." Arts. 31 and 36, Manual for Courts-Martial, U.S. Coast Guard, 1949. All other courts-martial were reviewed by the Secretary of the Treasury, and the President in the case of dismissal of an officer. 14 USC § 564(d) (1949); Art. 140, Manual, USCG, *supra*. No Coast Guard court-martial could impose a sentence exceeding a discharge, confinement for

5 years, forfeiture, and reduction. 14 USC § 564(b) and (c); *see* Art. 50, Manual, USCG, *supra*.

After the Uniform Code of Military Justice became effective in 1951, convening authorities in all services retained the authority and responsibility to review the record of trial for legal sufficiency. *See* Art. 64, 50 USC § 651, recodified in 10 USC § 864 (1956) ("[T]he convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact. . . .").

The 1950 Code made boards of review mandatory for the Navy, Marine Corps, and Coast Guard. They were already mandatory for the Army by virtue of AW 50½, enacted in 1920. This AW was made applicable to the Air Force by 62 Stat. 1014 (1948), codified in 5 USC § 627k (1948). Article 66(a) (1950) mandated:

> The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

Effective in 1969, Article 66(a) was revised to its present language, as follows:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. . . .

Boards of Review were a new entity, created by Congress for the Army in 1920, the Air Force in 1948, and

the Naval services in 1951. For the first time, there was a level of formal appellate review beyond the officer who convened the general court-martial. Also, for the first time, a permanent military tribunal was established, as compared to courts-martial which are temporary entities. Article 66 vested no discretion in the Judge Advocates General; boards of review were mandatory. We are satisfied that Congress, acting indirectly through the Judge Advocates General, created a new office by establishing boards of review. *Cf. Dettinger v. United States*, 7 MJ 216 (CMA 1979) (Congress, acting through Judge Advocate General, created Court of Military Review).

Unlike the Court of Military Appeals, created in 1950 as an instrument of civilian oversight imposed upon the military services, the boards of review were intended as military tribunals constituted by competent military authority from within each service. The mandate to each Judge Advocate General to "constitute" boards of review was consistent with the traditional practice of vesting the authority and responsibility for constituting military tribunals in military officers and giving them the authority to appoint the members.

That Congress intended the boards of review to be tribunals of a different nature from the Court of Military Appeals is apparent both from the language of the statutes creating them and the legislative history. The statute first creating the Court of Military Appeals used traditional language for creating a civilian Article I court: "There is hereby established a Court of Military Appeals. . . ." Art. 67(a)(1), 64 Stat. 129 (1950). In 1969 the provision was amended to read: "There is a United States Court of Military Appeals established under article I of the Constitution of the United States. . . ." Finally, in Article 141, 10 USC § 941 (1989) Congress described the Court's status as follows: "There is a court of record known as the United States Court of Military Appeals. The court is established under article I of the Constitution." This is virtually the identical

language used by Congress to create other Article I courts. *See* 26 USC § 7441 ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court."); 38 USC § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals."). The language creating the boards of review was substantially different: "The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review. . . ." 50 USC § 653 (1950), recodified in 10 USC § 866 (1956).

This difference in language was not accidental. Indeed, in 1966, Senator Sam Ervin held hearings on a bill to establish a Court of Military Review in each service which would have been appointed by the service secretary and whose judges, both military and civilian, would have served for a fixed term of office. That bill used language similar to the organic statutes for the Court of Military Appeals, the Tax Court, and the Court of Veterans Appeals. It would have amended Article 66(a) to read: "There is established for each military department an appellate court. . . . Each such court is a court of record and shall be known as the Court of Military Review for the military department for which it is established." Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. and the Special Subcomm. of the Senate Armed Services Comm., 89th Cong., 2d Sess. 497-98 (1966). The bill was not enacted. Two years later, Article 66(a) in its present form was enacted.

The Senate Hearings on the 1950 Code reveal the intent of the drafters to use military expertise on the boards of review. The following exchange between Senator Kefauver and Professor Morgan is instructive:

> SENATOR KEFAUVER. . . . May I ask at this point, was there any difference of opinion on the part

of the committee or extensive discussion as to whether each service should have its own reviewing section?

MR. MORGAN. No; the committee was unanimous on that, so far as the board of review is concerned.

The notion was that each service would know more about the customs of the service, and all that sort of thing, and that the Judge Advocate General of that particular service would be the man that would be most competent to handle that thing from the point of view of this board of review, because the board of review, now, has very extensive powers.

Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Armed Services Comm., 81st Cong., 1st Sess. 42 (1949).

The amendments enacted in 1968 to Article 66(a) did not change the character or authority of the boards of review but merely completed the evolution by calling them what they were: appellate courts composed of appellate military judges. The legislative history of the 1968 amendment reflects that the redesignation of boards of review as a Court of Military Review was only a name change, designed to enhance the stature of the board of review by calling it a court and calling its members judges. This change was consistent with redesignating law officers as military judges. *See* S.Rep. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968); The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975 at 247 (U.S. Gov't. Printing Office). Certain organizational changes were mandated to improve efficiency and protect the independence of appellate military judges; but no new authority was conferred, no new duties imposed, and no new appointment procedures for appellate military judges were established.

B. Germane Duties

Turning the second question, we observe that military officers traditionally have been responsible for legal review of court-martial convictions in their capacities as reviewing and supervisory authorities. Prior to the creation of boards of review, military commanders were responsible for the legal review of courts-martial convened by them or their subordinates. *See* 53d AGN (1934) (record reviewed by "commander of the fleet or officer ordering the court"); 32d AGN (1934) (summary court-martial reviewed by "officer ordering the court" and "his immediate superior in command"); AW 46 and 47 (1920) (record reviewed by convening authority); para. 35, Manual for Courts-Martial, U.S. Coast Guard, 1949 (deck court reviewed by Commandant of Coast Guard); § 472, Naval Courts and Boards, 1937 (commander reviewing the record must examine jurisdictional issues, legal sufficiency of pleadings, objections to evidence, and legal sufficiency of evidence).

A cadre of legally trained officers existed in each of the services prior to 1920. The language of Article of War 50½ and Article 66 of the Code reflect that Congress had this cadre of legally trained officers in mind when boards of review were first created in 1920 and extended to all the services in 1951. Congress considered the duties of the boards of review not only germane to military duties, but particularly appropriate for military lawyers. We hold that the duties of the newly-created boards of review were "germane" to the duties of the legally trained military officers contemplated by AW 50½ and Article 66 of the Code; therefore, we hold that a second judicial appointment is unnecessary.

C. Civilian Members

Turning finally to the significance of the provision for civilian members, the legislative history of Article 66(a) reflects that the historical antecedent of the boards of re-

view created by Article 66(a) was the Army board of review, composed of military officers, which was created by AW 50½. The provision for civilian members was not included in AW 50½, but was added to Article 66(a) at the request of the Coast Guard. During the 1949 hearings on the proposed Uniform Code of Military Justice, Mr. Larkin explained the provision for civilian members as follows:

> Well, they were included initially at the request of the Coast Guard—not that it be worded this specific way but the Coast Guard does have civilian lawyers working in their court-martial procedures during peacetime, and they feel they are very competent.
>
> They don't have an unusually large number of officers in their review, and they wanted to be free if they desired to appoint a civilian lawyer working for the Coast Guard to a board of review. This was the easiest way to make that provision.

Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 1189 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

In appellant's case we need not decide whether Congress inadvertently exceeded its authority by vesting the powers of an "Officer of the United States" in civilians who had not been appointed in accordance with the Appointments Clause, because no civilians participated in the appellate review of his case. We regard the provision for civilian members of boards of review and their successors, the Courts of Military Review, as severable from the remainder of Article 66(a). Congress had two purposes in enacting Article 66(a). The primary purpose was to make boards of review mandatory for all services. The secondary purpose was to accommodate the Coast Guard by authorizing civilian members on boards of review. Where a statute attempts to accomplish two or more objects, it may be valid as to one and invalid as to others, as long as its purpose can be accomplished by the valid part and is not dependent upon or conditioned by the invalid part. *Sutherland Stat. Const.* § 44.07 at 503-04 (4th Ed.1986 Revision).

D. Conclusion

Applying the *Shoemaker* analysis to appellant's case, we hold that appellate military judges need not be reappointed to perform judicial duties because judicial duties are "germane" to the offices already held by them as legally trained commissioned officers of their respective armed forces. Accordingly, we hold that appointment of the appellate military judges who reviewed appellant's case was consistent with the Appointments Clause.

We have not addressed the desirability of a legislative requirement that trial and appellate military judges be specifically appointed as judges by the President, a Court of Law, or the Head of a Department, and we consider it inappropriate to do so. Congress has the power to require a second "judicial" appointment if considered desirable. Congress considered such a measure in 1966 but did not enact it. We decide only that a second "judicial" appointment was not constitutionally required for the trial and appellate judges involved in appellant's case. As we stated in *United States v. Henderson*, 34 MJ 174, 178 (CMA 1992), "As a court . . . we are not involved in the merits of . . . policy. We interpret statutes, and we can strike them down only when they violate the Constitution."

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

CRAWFORD, Judge (concurring in the result):

The lead opinion has put forward a thoughtful and well-reasoned analysis of how Article II, section 2, paragraph 2, clause 2, of the United States Constitution is not violated by the present manner of selecting military judges. However, I part ways with the underlying premise of the lead opinion that the Appointments Clause applies to the selection of a military judiciary and therefore can only concur in the result.

In concluding that the Appointments Clause does not apply either to selection of military trial or military appellate judges, one of necessity must engage in both an historical and a contemporary analysis of the Constitution and its Appointments Clause. In applying both approaches, the intentions of the Framers can be determined from documents that are available. *See, e.g.*, 4 P. Kurland & R. Lerner, *The Founders' Constitution* (hereafter Kurland) (1987); J. Harris, *The Advice and Consent of the Senate* (hereafter Harris) 25-30 (1953).

A. The Historical Approach

At the time of the Constitutional Convention in Philadelphia from late May to mid-September 1787, no thought was given to how the Appointments Clause should be applied to military trial and appellate judges. Kurland, *supra* at 28-38. Two major themes dominated the debates which shaped the Appointments Clause. First, those who opposed a strong executive resisted giving the chief executive the nomination authority over the national judiciary without some sort of Council to screen the appointment process. Second, those who opposed a strong legislature feared that if the appointment authority was given to the legislative branch, the appointment of a national judiciary would fall into the hands of certain factions. Harris, *supra* at 25-30.

At the time of these debates there was no military judiciary in place, that function being served by military

officers. There was, however, a great deal of debate and attention paid to a federal civilian judiciary as evidenced by Alexander Hamilton's discussions in *The Federalist Papers*, Nos. 78 through 83.[1] Thus, historically, the Founding Fathers gave no explicit consideration to including a military judiciary within the ambit of the Appointments Clause.

B. The Contemporary Approach

A contemporay approach to reviewing our Constitution and its provisions looks at the intent of the Framers and the interests and values they meant to protect.

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[1] No. 78, "A VIEW OF THE CONSTITUTION OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TENURE OF GOOD BEHAVIOR," wherein Hamilton discusses "the doctrine of judicial review," stating: "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

No. 79, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE PROVISIONS FOR THE SUPPORT AND RESPONSIBILITY OF THE JUDGES," wherein Hamilton expresses "[t]houghts on the salary, tenure, accountability, and age of judges."

No. 80, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE EXTENT OF ITS POWERS," wherein "Hamilton traces the outlines of the judicial power."

No. 81, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE DISTRIBUTION OF ITS AUTHORITY," wherein Hamilton "states the case for a distinct, learned, independent Supreme Court, then speculates on the relations of the Supreme Court to the lower courts."

No. 82, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN REFERENCE TO SOME MISCELLANEOUS QUESTIONS," wherein Hamilton discusses "the relations of the federal and State courts."

No. 83, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TRIAL BY JURY," wherein "Hamilton attempts . . . to quiet the fears of" some with a discussion "of this ancient 'palladium of free government.'"

The Federalist Papers, xxx-xxxi (A. Hamilton, J. Madison, J. Jay) (C. Rossiter 1961).

A contemporary reading of the Constitution is important because as John Marshall stated: "[I]t is a constitution we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). The Constitution is a living document and "states or ought to state not rules for the passing hour, but principles for an expanding future," B. Cardozo, *The Nature of the Judicial Process* 83 (Yale Univ. Press 1921), and "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910).

Utilizing a contemporary analysis I start by asking what interests and values were meant to be protected by the Appointments Clause. It is undisputed that the Appointments Clause was designed as a series of checks and balances between the Executive and Legislative Branches on the creation and filling of offices. Kurland, *supra*, 424 U.S. at 33. The Framers were concerned with a division of power to prevent one branch from becoming more powerful than the other.

The debates among the Framers over appointments authority in general and judicial appointments in particular bear out their desire for checks and balances as well as for qualified appointees. Edmund Randolph of Virginia argued that if appointment authority was in the legislative branch, this "generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." Whereas George Mason, also of Virginia, argued that, if the appointment to the judiciary was with the executive, it was "a dangerous prerogative. It might even give him an influence over the Judiciary department itself." *Id.* at 33.

Alexander Hamilton of New York thought that giving the Senate approval authority over nominations would be a check on the "spirit of favoritism of the President"

and would work against the appointment of unqualified individuals or individuals selected because of a family connection or personal attachment. Harris, *supra* at 28. Hamilton argued that to empower the legislature with appointment authority would just lead to "intrigue and cabal." *Id. Cf. Kurland, supra* at 31. Nathaniel J. Ghorum (also spelled Gorham in some texts) of Massachusetts thought it best that the Executive be responsible for appointment because "he will be careful to look through all the States for proper characters." *Id.* at 31. To prevent dependency on a single individual making the appointment, some Framers thought it best to have the Senate vote on the appointments. Others were concerned that a Senate vote would mean too "much fettering [in] the Senate." *Id.* at 32. Eventually the Framers settled on appointments by the executive with the advice and consent of the Senate.

In defense of the appointment power enunciated in the Constitution, Alexander Hamilton in *The Federalist* No. 66 commented as follows on how the appointment power would work:

> It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the sen-

> ate would feel any other complacency towards the object of an appointment, than such, as the appearances of merit, might inspire, and the proofs of the want of it, destroy.

The Federalist: A Collection of Essays Written in Favour of The New Constitution, vol. II at 218-19 (J. and A. McLean, New York, 1788) (hereafter cited as McLean).

Thus the interests and values of providing for the selection of officers, including judicial officers, based on merit and dividing power between the executive and legislative branches gave birth to the Appointments Clause. The question remains whether, in order to protect those interests and values, it is necessary to select military trial and appellate judges pursuant to the Appointments Clause. In order to answer that question we must also examine the additional interests and values unique to national security and military matters which the Framers sought to protect. In so doing we can determine whether these other factors justify treating the military judiciary different from the federal civilian judiciary and thereby render the Appointments Clause inapplicable to military judges.

C. Analysis

Because of national security interests and concerns for unforeseen military exigencies, it was the intent of the Framers to vest great authority over these matters in Congress. L. Tribe, *American Constitutional Law* 353-56 (2d ed. 1988). They accomplished this in the Constitution through the enumerated powers of Article I, Section 8, Clauses 11 through 16 and 18. Under the enumerated powers, Congress has the power to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14); and

"make all laws that are . . . . necessary and proper" (cl. 18).

The rationale for this approach by the Framers is found in Alexander Hamilton's *Federalist* No. 23:

> The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*[*] The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.
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> * * * *
>
> Whether there ought to be a federal government intrusted with the care of the common defence is a question, in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be cloathed with all the powers requisite to the complete execution of its trust. And unless it can be shewn, that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter es-

> sential to its efficacy; that is, in any matter essential to the *formation, direction* or *support* of the NATIONAL FORCES.

McLean, *supra*, vol. I at 144-45 (some emphasis [*] added).

This view was underscored by James Madison in *The Federalist* No. 41:

> But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?
>
> The answer to these questions has been too far anticipated, in another place, to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence? If a federal Constitution could chain the ambition, or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

McLean, *supra*, vol. II at 39.

Yet the Framers, mindful of the new nation's fears regarding establishment of a standing armed force in peacetime, S. Padover, *To Secure These Blessings* 203-08 (1962), did not propose to give the new executive and legislature this great authority without some limitation. Article I, Section 8, Clause 12, gives Congress the authority to "raise and support Armies" but also provides that "no Appropriation of Money to that Use shall be for a longer Term than two Years." In *The Federalist* No. 26, Alexander Hamilton puts forth a spirited defense of this clause that limits appropriations for military purposes to two Years:

> The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be no doubt persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favourable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition: And if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against incroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

McLean *supra*, vol. I at 165-66.

An examination of the military judiciary, although similar to its civilian counterpart in the importance and

scope of its duties, also reveals marked dissimilarities from a civilian judiciary because of the ever-existent potential for military exigencies. "Military exigencies" is not a term of art; our armed forces are not a garrison force. In the past 4 years alone, our military men and women have deployed to Panama in Operation Just Cause and to Southwest Asia in Operations Desert Shield and Desert Storm. In addition, they have participated in the humanitarian mission to aid Kurdish refugees, Operation Provide Comfort, following Operation Desert Storm. Even as this opinion is being released, our troops are serving in Somalia as part of a relief effort called Operation Restore Hope.

These missions require worldwide deployment and the need for instant mobility and flexibility in assignments, including military judge assignments. Military judges must try cases in combat environments, and, due to the potential for military judge casualties, replacements must be available at a moment's notice. The ever-expanding role of the military only underscores the wisdom of our Founding Fathers in entrusting Congress with the authority and responsibility for providing for its day-to-day operations.[2]

In carrying out its enumerated responsibilities Congress has paid careful attention to the military justice system. Starting in 1950 with the adoption of the Uniform Code of Military Justice, Congress has been very active in expanding the status and power of the military judge. In

[2] For example if during Desert Shield/Storm a scud missile hit a barracks housing one or more judges from the services, replacements would be needed immediately. A service Judge Advocate General looking for qualified individuals might select an individual from the Court of Military Review. Likewise, if there was a heavy case load before the Court of Military Review, for example, a series of classified cases, the Judge Advocate General should have the flexibility of assigning a trial judge not involved with those cases to the appellate court.

1950, Congress provided for the law officer who was the forerunner of the military trial judge. *See* Pub.L. No. 81-506, 64 Stat. 117. In the Military Justice Act of 1968, Pub.L. No. 90-632, 82 Stat. 1335, Congress provided for military judges (at 1336) and the Courts of Military Review (at 1341). *See generally* Cox, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 Mil.L.Rev. 1 (1987); Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, The Army Lawyer 23 (Dept. of the Army Pamphlet 27-50-239, October 1992).

In addition to his or her constitutional role as Commander-in-Chief, U.S. Const. art. II, § 2, the President has a specific role for military justice matters. Pursuant to its authority under the Constitution, Congress, through Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a) (1979), has given the President the authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for . . . [trials by] courts-martial." Based on this delegation of authority from Congress, the President has by Executive Order set forth many rules in the Manual for Courts-Martial, United States, 1984, that pertain to the authority of the military judge. *See generally* 1 F. Gilligan and F. Lederer, *Court-Martial Procedure* 514-56 (1991).

In fulfilling its responsibilities, Congress has been mindful of the interests sought to be protected by the Appointments Clause. First, with respect to selection of qualified individuals to serve as military judges, Congress has determined that these assignments be made by the Judge Advocate General of each service who has direct responsibility for military justice within his or her respective service.[3] Congress has implicitly recog-

[3] Article 26(c), Uniform Code of Military Justice, 10 USC § 826(c), provides: "The military judge of a general court-martial

nized that the Judge Advocates General are uniquely situated to determine which officers are best qualified within their respective services to serve as both trial and appellate judges. Moreover, these same individuals have by necessity great flexibility to make these assignments [4] quickly in a combat environment where casualties or other exigencies may affect the military judiciary.

Second, with respect to establishing a system of checks and balances between the Executive and Legislative branches, it is difficult to see how the present system of assigning military judges jeopardizes that delicate balance. If anything, the creation by Congress in 1951 of the United States Court of Military Appeals, a federal civilian court subject to the Appointments Clause, which reviews decisions of the military judiciary, more than satisfies any concerns in that regard. *See* 64 Stat. 129. Additionally, effective August 1, 1984, Congress provided in Article 67(h)(1), UCMJ, 10 USC § 867(h)(1), now

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shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . ."

Article 66(a), UCMJ, 10 USC § 866(a), provides: "Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges."

See also Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand.L.Rev. 169 (1953); Comments, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 Tex.L.Rev. 651 (1951).

[4] Article 6(a), UCMJ, 10 USC § 806(a), states:

> The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

Article 67a, UCMJ, 10 USC § 867a (1989), that decisions of our Court are reviewable by the Supreme Court of the United States by writ of certiorari, Military Justice Act, Pub.L. No. 98-209, § 10(c)(2), 97 Stat. 1393, 1406, thereby providing the ultimate check on judicial decisions of the military justice system.

If there is dissatisfaction with the military justice system as it exists today, it can be changed or modified by the majoritarian process. That is, the elected representatives of Congress, in consultation with the Executive branch, have the power to make any necessary changes. But this Court must not, by judicial fiat, impose the procedures intended for a federal civilian judiciary upon the military under the guise of the Constitution. To do so would be to ignore the constitutional deference given to Congress by our Founding Fathers because of the realities and practicalities of national security exigencies.

D. Special Deference

Based on the intent of the Framers, the Constitution, and Federal statute, the Supreme Court has given great deference to the authority of Congress and the President in military matters. The Supreme Court has repeatedly recognized the power of Congress to provide for military justice. Judge Grace in *United States v. Prive*, 35 MJ 569, 573-74 (CGCMR 1992), has listed some of those decisions as follows:

Dynes v. Hoover, 61 U.S. (20 How.) 65, 79, 15 L.Ed. 838 (1858) ("These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations. . . .").

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 18 L.Ed. 281 (1866) ("Congress has declared the kinds of trial

[for offenses by soldiers] and the manner in which they shall be conducted. . . .").

Parker v. Levy, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . [T]he military has, again by necessity, developed laws and traditions of its own during its long history.")

Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591, 609 (1975) ("The laws and traditions governing [military] discipline have a long history; . . . they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.")

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66, 102 S.Ct. 2858, 2869, 73 L.Ed. 2d 598 (1982) ("[T]he exercise by Congress and the Executive of the power to establish and administer courts-martial . . . involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.")

In *United States v. Prive*, *supra* 35 M.J. at 576, Judge Grace summarized the effect of these decisions on the present issue by paraphrasing a statement from *Northern Pipeline* as follows:

> [T]hese precedents [of the Supreme Court] "represent no broad departure from the constitutional command that" *appointments must be made in accordance with the Appointments Clause.* Rather, they reduce to a narrow situation not subject to that command, that "recogniz[es] a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power" *to designate military judges outside of the provisions of the Appointments Clause "was consistent with, rather than threatening to, the constitutional mandate of separation of powers."*

See 458 U.S. at 64, 102 S.Ct. at 2868 (emphasis added).

Judge Grace also relied on this statement from *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987):

> Decisions of this Court after *O'Callahan* [*v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)] have also emphasized that *Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.* As we recently reiterated, "'[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'"

(Emphasis added and citations omitted.)

I agree with the Coast Guard Court of Military Review and "conclude that Congress, in legislating for the land and naval forces, may provide for the designation of judges within the military justice system in a manner not provided for in the Appointments Clause of the Constitution." 35 MJ at 577.

SULLIVAN, Chief Judge (dissenting):

I respectfully disagree with the lead opinion and Judge Crawford's separate opinion in this case. In my view the Constitution speaks clearly on the granted issue, and we are duty-bound to follow its supreme command. U.S. Const. art. VI. Military judges, both trial and appellate, are "inferior Officers" of the United States and must be appointed to their offices by "the President alone," or by this Court or one of the other "Courts of Law," or by the Secretary of Defense or one of the other "Heads of Departments." Art. II, § 2, para. 2, cl. 2. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Appellant's military judges were not so appointed, but their status as *de facto* appointees might preclude reversal of his conviction. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-43, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). Nevertheless, I must dissent to the majority's simple affirmance of this case. *Id.*

More particularly, I do not believe that Congress' broad power to make rules for the land and naval forces under Article I, § 8, clause 14 of the Constitution is unlimited such that the Appointments Clause can be considered *per se* inapplicable to military justice legislation. *See generally Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 660, 102 L.Ed.2d 714 (1989). (Even Congress' primary duty to make laws is limited by the constitutional prohibition against an ex post facto Law-*e.g.*, Art. I, § 9, para. 3). A contrary opinion in my view is extremely dangerous in that it upsets the delicate system of checks and balances provided in our Constitution to ensure the American way of government.

I also would hold that commissioning and promoting military officers by the President by and with the advice

and consent of the Senate does not obviate the need for additional constitutional appointments of such persons for higher or more responsible offices both within and without the military department (*i.e.*, military trial judge or appellate judge). There is no blanket "commissioned officer" exception to the Appointments Clause written in the Constitution, and the decision of the Supreme Court in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), should not be broadly extended to create one for military officers who are simply "legally trained." In sum, consistent with my judicial philosophy of spurning judicial legislation, I also must reject the judicial constitution-making accomplished by the lead opinion in this case.

I

The Granted Issue

The issue raised by appellate defense counsel and granted review by this Court is as follows:

> WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

In this regard, I note that the judge in this trial was Major Edward F. Pesik, Jr., United States Marine Corps. He was certified in accordance with Article 26(b), Uniform Code of Military Justice, 10 USC § 826(b); sworn in accordance with Article 42(a), UCMJ,

10 USC § 842(a); and detailed to this case.[1] The appellate military judges in this case were Senior Judge James A. Freyer, a Navy Captain; Senior Judge Richard A. Strickland, a Marine Colonel; and Judge James E. Orr, a Navy Captain. These judges constituted Panel No. 1 of the Court of Military Review, and they reviewed appellant's case in accordance with that court's internal rules.

The issue of law raised by appellate defense counsel and granted by this Court focuses on the "designat[ion]" of the military judge who tried his case and the "designat[ion]" of the military appellate judges who heard his appeal. Appellant does not contend that these designations were accomplished in violation of the Uniform Code of Military Justice. Instead, he contends that they were not accomplished in accordance wih the Appointments Clause of the United States Constitution. Art. II, § 2, para. 2, cl. 2. Relying heavily on the recent Supreme Court decision in *Freytag v. C.I.R., supra*, he asserts that military judges "are 'Officers of the United States'" who must be "appointed as such by the President, the Courts of Law, or the Head of a Department." Final Brief at 10. Finally, he asserts that the designation of these military judges by the Judge Advocate General of the Navy fails to satisfy this constitutional appointment standard.

II

The Statutes Establishing The Military Judge

A necessary step in resolving the granted issue is to understand the statutes which create the military trial and appellate judges and provide for persons to fill these judicial positions. At the outset I note that Congress has not expressly provided that a person be "appointed"

[1] Appellant represents without opposition that Major Pesik was a "General Court-Martial qualified" judge and the Sierra Judicial Circuit's Chief Military Judge.

a military trial judge or appellate judge. However, in the version of the Uniform Code of Military Justice enacted in 1950, Congress did provide for "appoint[ment]" of a law officer, the statutory predecessor of the military judge, by appropriate convening authorities. *See* Art. 26(a), UCMJ, 50 USC § 590(a), recodified in 10 USC § 826(a) (1956). Furthermore, in the 1950 Code, Congress provided for "appoint[ment]" of judges of this Court "by the President, by and with the advice and consent of the Senate." Art 67(a), UCMJ, 50 USC § 654(a), recodified in 10 USC § 867(a) (1956); *see* Art. 142(b)(1), UCMJ, 10 USC § 942(b)(1) (1989). Despite Congress' obvious familiarity with the appointment terminology, it chose to create the military judge and provide for filling this government position with somewhat less direct language.[2]

I first note that, since 1969, Article 26(b) had provided that "[a] military judge shall be a commissioned officer of the armed forces." 10 USC § 531 further provides:

> **§ 531. Original appointments of commissioned officers**
>
> (a) *Original appointments in the grades* of second lieutenant through colonel in the Regular Army,

[2] What is an "appointment" for purposes of the Appointments Clause is a substantial constitutional question concerning separation of powers which implicates all three branches of our Government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155, 2 L.Ed. 60 (1803). *See generally Buckley v. Valeo*, 424 U.S. 1, 122-24, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Moreover, in *Auffmordt v. Hedden*, 137 U.S. 310, 327, 11 S.Ct. 103, 108, 34 L.Ed. 674 (1890), the Supreme Court clearly held that Congress' use of the word "select" rather than "appoint" was but one factor to be considered in determining whether the Appointments Clause applied. Finally, in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court impliedly held that designation of officers for additional duty requires compliance in some manner with the Appointments Clause.

Regular Air Force, and Regular Marine Corps and in the grades of ensign through captain in the Regular Navy *shall be made by the President, by and with the advice and consent of the Senate.*

(Emphasis added.) *See also* 10 USC § 593 (appointment in reserves in commissioned grades below lieutenant colonel and commander by President alone).

The qualifications for original appointment are also statutorily established:

> **§ 532. Qualifications for original appointment as a commissioned officer**
>
> (a) Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to a person who—
>
> (1) is a citizen of the United States;
>
> (2) is able to complete 20 years of active commissioned service before his fifty-fifth birthday;
>
> (3) is of good moral character;
>
> (4) is physically qualified for active service; and
>
> (5) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

Article 26(b) (1969) also provides that a military judge must be "a member of the bar of a Federal court or a member of the bar of the highest court of a State." This requirement for legal training is somewhat less stringent than the requirement for detail as trial counsel or defense counsel at a general court-martial. *See* Art. 27(b), UCMJ, 10 USC § 827(b), which states:

> (b) Trial counsel or defense counsel detailed for a general court-martial—

> (1) must be a *judge advocate who is a graduate of an accredited law school* or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and
>
> (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(Emphasis added.)

I next note that Article 26(b) (1969) provides that a military judge must be "certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member." The standards for certification are not provided by statute, and there is no statutory requirement that a military judge be designated a member of the Judge Advocate General's Corps or a Marine Corps judge advocate. However, as a practical matter, military judges to be certified as qualified normally would have experience as a trial or defense counsel under Article 27(b). This statute alternatively requires designation as a "judge advocate."

In fact, the military judge who presided over this court-martial was a Marine judge advocate. *See* NAVMC P-1005, Officers on Active Duty in the Marine Corps at 1-43 (1 Oct.1989, 48th Rev.). 10 USC § 5587a provides:

> **§ 5587a. Regular Marine Corps: judge advocates**
>
> *With the approval of the Secretary of the Navy,* any regular officer on the active-duty list of the Marine Corps who is qualified under section 827(b) of this title *may, upon his application, be designated as a judge advocate.*

(Emphasis added.)

Moreover, two of the appellate military judges who heard his appeal before the Court of Military Review were members of the Navy Judge Advocate General's Corps. 10 USC § 5150 provides:

> **§ 5150. Staff corps of the Navy**
>
> (a) *The staff corps of the Navy are—*
>
> (1) the Medical Corps;
>
> (2) the Dental Corps;
>
> (3) *the Judge Advocate General's Corps;*
>
> (4) the Chaplain Corps; and
>
> (5) such other staff corps as may be established by the Secretary of the Navy under subsection (b).
>
> (b)(1) The Secretary of the Navy may establish staff corps of the Navy in addition to the Medical Corps, the Dental Corps, the Judge Advocate General's Corps, and the Chaplain Corps. *The Secretary may designate commissioned officers in, and may assign members to, any such staff corps.*

(Emphasis added.)

As indicated above, designation as a judge advocate does not determine where or when a commissioned officer serves this duty. Article 6, UCMJ, 10 USC § 806 (1984), further comments on the assignment for duty of judge advocates, as follows:

> **§ 806. Art. 6. Judge advocates and legal officers**
>
> (a) The *assignment for duty of judge advocates* of the Army, *Navy*, Air Force, and Coast Guard *shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direc-*

> *tion of the Commandant of the Marine Corps.* The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(Emphasis added.) The legislative history makes clear that Congress intended the Judge Advocate General of each service to play a substantial initiating role in the assignment process while reserving to military personnel authorities the final say.[3] *See* Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 898-901 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

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[3] 10 USC § 5013(g) provides:

> (g) The Secretary of the Navy may—
>
> (1) assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy;
>
> (2) change the title of any officer or activity of the Department of the Navy not prescribed by law; and
>
> (3) prescribe regulations to carry out his functions, powers, and duties under this title.

10 USC § 5131 creates the Bureau of Naval Personnel and 10 USC § 5132 empowers it as follows:

> § 5132. Bureaus: distribution of business; orders; records; expenses
>
> (a) Except as otherwise provided by law, the business of the executive part of the Department of the Navy shall be distributed among the bureaus as the Secretary of the Navy considers expedient and proper.
>
> (b) Each bureau shall perform its duties under the authority of the Secretary, and its orders are considered as coming from the Secretary.
>
> (c) Under the Secretary, each bureau has custody and charge of its records and accounts.
>
> (d) Each bureau shall furnish to the Secretary estimates for its specific, general, and contingent expenses.

For members of the Marine Corps, these powers are vested in the Commandant of the Marine Corps. *See* 10 USC § 5043(e)(3).

Article 26(c) (1969) also provides that a "military judge of a general court-martial *shall be designated by the Judge Advocate General*, or his designee, of the armed force of which the military judge is a member *for detail* in accordance with regulations prescribed under subsection (a)." (Emphasis added.) The language of designation is not new (10 USC § 8067) and generally refers to "a special duty classification." *See* 1967 U.S.Code Cong. & Admin. News 2113, 2114. Again the actual assignment of a designated military judge to Navy-Marine Corps Trial Judiciary is impliedly left to military personnel authorities. *See* SECNAVINST 5813.6C (13 April 1979).[4]

Finally, Article 26(a) (1969), in providing for detailing military judges to hear particular cases, states:

> (a) A military judge shall be detailed to each general court-martial. *Subject to regulations of the Secretary concerned*, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(Emphasis added.) As noted in *United States v. Graf*, 35 MJ 450 (CMA 1992), these regulations provide that detailing will be accomplished by the Chief Judge, the circuit military judge, or the circuit military judge's designee. *See* §§ 0120a(1) (1987); 0130a(1) (1990), Manual of the Judge Advocate General of the Navy.

In sum, the President and the Senate make a person a commissioned officer; the Secretary of the Navy makes that commissioned officer a judge advocate; the Judge Advocate General qualifies and classifies that judge advocate as a military judge; the Chief of Naval Personnel or the Commandant of the Marine Corps assigns him a duty station; and the Secretary of the Navy provides regulations for his detail to a particular case within that duty assignment.

III

Constitutional Tension

In view of these empowering statutes, it is now appropriate to turn to the United States Constitution. *See Dynes v. Hoover*, 61 U.S. (20 How.) 65, 61 U.S. 65, 15 L.Ed. 838 (1858). Article I, § 8 of the Constitution provides:

> The Congress shall have Power
>
> * * * *
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;

---

[4] 6. Organization. The Navy-Marine Corps Trial Judiciary is a naval activity as that term is defined in [U.S. Navy Regulations, 1973]. It is composed of the Office of the Chief Judge of the Navy-Marine Corps Trial Judiciary and such Judicial Circuits and their Branch Offices as may be established by the Judge Advocate General. The Judge Advocate General may also establish Judicial Areas, each consisting of two or more Judicial Circuits, for the purpose of providing an intermediate level of supervision within the Trial Judiciary. Expansion of the Navy-Marine Corps Trial Judiciary will come from current manpower resources as determined by the Chief of Naval Operations, the Commandant of the Marine Corps, and the Judge Advocate General, acting in coordination. The Marine Corps Special Court-Martial Judiciary is disestablished, and its members are members of the Navy-Marine Corps Trial Judiciary.

* * * *

8. Authority Over Organization, Functions and Administration. The Judge Advocate General is authorized to organize, administer, assign, and reassign functions to the Navy-Marine Corps Trial Judiciary and personnel attached thereto in accordance with [10 USC § 826 et. seq.].

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces[.]

In addition, I note that this same section of the Constitution further provides:

The Congress shall have Power

• • • •

To constitute Tribunals inferior to the supreme Court;

• • • •

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Clearly, these constitutional grants of authority are sufficient to provide for the above-noted statutory establishment of a military justice system with military trial and appellate judges. *See Solorio v. United States*, 483 U.S. 435, 441, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975). *See also Rostker v. Goldberg*, 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478 (1981).

I also note the operative provisions of the Constitution which appellant asserts are applicable to the appointment of military judges. Article II states in pertinent part:

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .

[*H*]*e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*

(Emphasis added.) Article II further states:

Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In view of these provisions of the Constitution, three distinct but nonetheless related issues are raised which this Court must decide. First, can Congress create the position of military judge and provide for its filling under Article I, § 8 of the Constitution without regard to the Appointment Clause of Article II, § 2 of the Constitution? (*See* Parts IV and V, below.) Assuming it cannot, what does Article II, § 2 of the Constituion require for a proper constitutional appointment to the office of military judge? (*See* Part VI below.) Finally, does the statutory system of designation/detail provided by Congress for military judges meet the above constitutional requirements? (*See* Part VII below.)

IV

The Scope of the Constitutional Power of Congress in Military Justice

It is beyond cavil that Congress has extremely broad powers to legislate in military matters generally and military justice matters in particular. Moreover, it is also quite clear that the Supreme Court has afforded great deference to Congress' decisions in this regard. The Coast Guard Court of Military Review has exhaus-

tively summarized the relevant Supreme Court cases supporting these assertions in its decision in *United States v. Prive*, 35 MJ 569, 573-75 (1992).

Despite these pronouncements, the Supreme Court has also made very clear that its deference to Congress in military matters is not absolute. *Rostker v. Goldberg*, *supra*, 453 U.S. at 67-68, 101 S.Ct. at 2653, states:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, *see Ex parte Milligan*, [71 U.S. (] 4 Wall. [)] 2, 18 L.Ed. 281 (1866); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 [40 S.Ct. 106, 108, 64 L.Ed. 194] (1919), but the tests and limitations to be applied may differ because of the military context. We of course, do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. *See Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. [94] at 103 [93 S.Ct. 2080, 2087, 36 L.Ed.2d 772 (1973)]. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

Moreover, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), the Supreme Court had earlier held that Congress' military justice powers were not totally independent of the rest of the Constitution. According to then-Justice Rehnquist:

> We recognize that plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty

> or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment.
>
> However, whether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974).
>
> In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial. As we held in *Burns v. Wilson*, 346 U.S. 137, 140, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508 (1953):
>
> > "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." (Footnote omitted.)
>
> 425 U.S. at 43, 96 S.Ct. at 1291. *See also Solorio v. United States*, 483 U.S. at 451 n.18, 107 S.Ct. at 2933 n.18.
>
> A question remains, however, whether Congress' power to make rules for the government and regulation of the Army and Navy is also limited or restricted by Article II, § 2, paragraph 2, clause 2 of the Constitution. The Coast Guard Court of Military Review in *United States v. Prive*, *supra*, has held that the Framers of the Constitution did not intend to include Congress' military justice power within the scope of the appointment clause. Relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 63-70, 102 S.Ct. at 2867-71, it asserts that the military justice system is one of those "narrow situations . . . in which the grant of

power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* at 64, 102 S.Ct. at 2868 (plurality opinion). *See* 35 MJ at 575-76.

I disagree with the Coast Guard Court of Military Review for several reasons. First, the Supreme Court in *Northern Pipeline* held that the bankruptcy courts were not legislative courts properly excepted from compliance with the requirements of Article III of the Constitution. While it stated that courts-martial created by Congress under Article I, § 8 of the Constitution were legislative courts, and thus were not affected by Article III of the Constitution, it went no further. The additional leap taken by the Coast Guard Court of Military Review in extending this decision into the area of Article II and the Appointments Clause in disregard of the plain language of the Constitution is simply not justified. *See Mimmack v. United States*, 97 U.S. 426, 437, 24 L.Ed. 1067 (1878); *see also Wood v. United States*, 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883); *Blake v. United States*, 103 U.S. 227, 232, 26 L.Ed. 462 (1881); 30 Op.Atty.Gen. 177, 180 (1913); 4 Op.Atty. Gen. 603, 610 (1847). *See generally* 4 P. Kurland and R. Lerner, *The Founders' Constitution* 31-38, 98 (1987).

Second, the principle of separation of powers disputed in *Northern Pipeline* was between the congressional and judicial branches of our government. However, the Supreme Court in *Northern Pipeline* clearly recognized that the Constitution's exceptional plenary grant of power over the Nation's armed forces was to both the Legislative and Executive Branches of our Government. *Id.* 458 U.S. at 71, 102 S.Ct. at 2871. Accordingly, the *ratio decidendi* employed by the Supreme Court in *Northern Pipeline* cannot be logically applied to a dispute between

branches of the government which *both* historically and constitutionally share that very power. *See generally* E. Corwin, *The President: Office and Powers (1787-1984)* at 296 (5th rev. ed. 1984).

Finally, the Supreme Court in *Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631, clearly recognized *two* concerns of the Framers of the Constitution in adopting the Appointments Clause of the Constitution. Justice Blackmun said:

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one Branch's aggrandizing its power at the expense of another Branch. *See Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 659, 102 L.Ed. 2d 714 (1989). The Appointments Clause not only guards against this encroachment *but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.*

Id. 501 U.S. at ——, 111 S.Ct. at 2638 (emphasis added).

More particularly, he later said:

> We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department the head of which is eligible to receive the appointment power. *The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may v st the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number*

> *of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See Wood,* at 79-80. So do we. For the chief judge of the Tax Court to qualify as a "Head of a Department," the Commissioner must demonstrate not only that the Tax Court is a part of the Executive Branch but also that it is a department.

Id. at ——, 111 S.Ct. at 2642 (emphasis added). This constitutional concern with Congress' excessive diffusion of the Executive's appointing power is simply not addressed by the *Northern Pipeline* rationale.

V

The Scope of the Constitutional Power of the Executive to Appoint Inferior Officers of the United States

The next inquiry concerns the actual scope of the Presidential appointment power. The general adage is that Congress creates the offices and the President appoints the necessary officers to fill them. *See generally* L. Tribe, *American Constitutional Law* 244 (2d ed. 1988) However, the words of the Constitution more particularly narrow the positions in the Federal government which are included within the constitutional appointment process.

Article II of the Constitution states:

> Section 1. The executive Power shall be vested in a President of the United States of America. . . .
>
> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and *he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, *and all other Officers of the United States,* whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment *of such inferior Officers,* as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.
>
> Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In light of these provisions, the first question which arises is who are "all other Officers of the United States" or "such inferior Officers, as they think proper" within the meaning of Article II of the Constitution. The Supreme Court in *United States v. Germaine,* 99 U.S. 508, 510, 25 L.Ed. 482 (1879), defined such officers as "all persons who can be said to *hold an office* under the government about to be established under the Constitution. . . ." (Emphasis added.) More recently, the Supreme Court spoke particularly on the office holders who could be considered "Officers of the United States," as follows:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine, supra,* is a term intended to have substantive meaning. *We think its fair import is that any appointee exercising significant authority pursuant to the laws of the*

> *United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.*

Buckley v. Valeo, 424 U.S. at 125-26, 96 S.Ct. at 685 (emphasis added). *See Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2640. In this light, a critical question in this case is whether a military judge is an Officer of the United States.

I note that this Court most recently in *United States v. Graf*, 35 MJ 450, 465 (CMA 1992), and *United States v. Mabe*, 33 MJ 200 (CMA 1991), analyzed the statutes and regulations concerning the military judge and concluded that "the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition." 35 MJ at 465. In addition, I note that in *Freytag v. C.I.R.*, *supra*, the Supreme Court expressly held that a special trial judge established by Congress "as an aide to [a] Tax Court judge" is "an 'inferior Officer' whose appointment must conform to the Appointments Clause." 501 U.S. at ——, 111 S.Ct. at 2640.

The Supreme Court in *Freytag* articulated its reasoning for reaching this conclusion, as follows:

> The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. *See Burnap v. United States*, 252 U.S. 512, 516-517, 40 S.Ct. 374, 376-377, 64 L.Ed. 692 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512, 25 L.Ed. 482 (1879). These characteristics distinguish special trial judges from special masters,

> who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. *Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.*
>
> Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§ 7443A(b)(1), (2), and (3), and (c), the chief judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority.

501 U.S. at ——, 111 S.Ct. at 2640 (emphasis added).

The position of military judge is established by law. *See* Arts. 26 and 66, UCMJ, 10 USC §§ 826 and 866, respectively. The duties and functions of a person in this position are also established by statute. *See* Arts. 26, 39, 51, and 66, UCMJ, 10 USC §§ 826, 839, 851, and 866, respectively. The Code authorizes military judges to hear and determine motions on various pretrial, trial, and posttrial matters (*see* Art. 39(a)); rule on all questions of law and interlocutory questions at courts-martial (Art. 51(b)); and impose Federal convictions up to and including life in prison, punitive separations from the service, and substantial financial penalties (Arts. 16(1)(B) and 18, UCMJ, 10 USC §§ 816(1)(B) and 818, respectively). A judge sitting with court members also in-

structs them on the various matters necessary to reach appropriate findings and sentences, even in capital cases where a servicemember's life is at stake. (Art. 51(c)). These are not ministerial tasks but judicial ones calling for the exercise of significant discretion. *See United States v. Graf*, 35 MJ 450; *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Finally, judges exercise independent authority. Art. 37, UCMJ, 10 USC § 837. *See United States v. Graf, supra.* In my view, the military judges and appellate military judges are "Officers of the United States," as provided for in Article II, § 2 of the Constitution.

VI

The Constitutional Requirements for a Valid Appointment

My next inquiry concerns the particular requirements provided in the Constitution for a valid appointment of "Officers of the United States." The answer to this question in large part depends on whether a military judge is one of "all other Officers of the United States" or is one of the "inferior Officers" generally denominated in Article II, § 2. *See United States v. Germaine*, 99 U.S. 508, 509-10, 25 L.Ed. 482 (1879). *See generally* R. Rotunda, J. Nowak, and J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 9.4 at 504-05 (1986). In light of the Supreme Court's characterization of a special tax court judge as an inferior officer in *Freytag v. C.I.R., supra*, I have no reservation in concluding that a military trial judge and military appellate judge are "inferior Officers" of the United States within the meaning of Article II, § 2. *See also Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612.

In this light a military judge need not be appointed by the President by and with the Advice and Consent of the Senate. However, it is required that he be appointed by "the President alone," a Court of Law, or a Head

of a Department. *Freytag v. C.I.R., supra.* Nevertheless, the lead opinion and the Navy-Marine Corps Court of Military Review in *United States v. Coffman*, 35 MJ 591 (1992), have held that this constitutional requirement is satisfied by a military officer's earlier commission and succeeding promotions by the President with the Advice and Consent of the Senate. Relying on *Shoemaker v. United States, supra*, they assert that no further appointment by the President, a Court of Law, or a Head of a Department is required to permit a "legally trained" military officer to constitutionally assume the office of military trial or appellate judge.[5]

The Navy-Marine Corps Court of Military Review articulated its rationale for its holding in *Coffman* as follows:

> Assuming *arguendo* that [the Appointments Clause] applies to military judges, the fact is that all military judges must be commissioned officers of the armed forces of the United States and, as such, have by law already been *appointed* by the President. Art. 26(b), UCMJ, 10 U.S.C. § 826(b); 10 U.S.C. §§ 101(4), 101(15), 531, 593, 624, 5001(6), 5912. Depending upon grade, component, and presence on the active-duty list, some of these commissioned officers by law must also have had their appointments confirmed by and with the advice and consent of the Senate. 10 U.S.C. §§ 531, 593, 624, 5912. All military judges must be lawyers. Art. 26(b), UCMJ, 10 U.S.C. § 826(b). The duties these commissioned officers are *detailed* to perform as military judges are within the sphere of their official duties and are germane to the office they already hold. A second appointment from the President to a commissioned

[5] This argument on its face fails to justify appointment of civilians to the Court of Military Review as authorized by Article 66, Uniform Code of Military Justice, 10 USC § 866.

> officer to perform the duties of a military judge is simply not required. *Cf. Shoemaker v. United States*, 147 U.S. 282, 299-301, 13 S.Ct. 361, 390-391, 37 L.Ed. 170, 185 (1892) (Army officers (engineers) were not required to obtain a second appointment to perform duties on a commission created by Congress to acquire lands for a park). Accordingly, we conclude the appellant's first assignment of error is also without merit.

35 MJ at 592.

The lead opinion more particularly posits two reasons why no further constitutional appointment of military judges is required by the Appointments Clause. First, it concludes that the office of military judge is not a "new office," so no additional appointment is required under *Shoemaker v. United States, supra.* Assuming it is a new office, the opinion holds that the germaneness of its duties to those duties previously performed by "legally trained military officers" also precludes the need for a second appointment under *Shoemaker.* I disagree.

The lead opinion concedes that a military judge is an Officer of the United States. Moreover, it notes that the new powers of this officer were previously shared by the members of a court-martial, its president, and its law officer. Thus, Congress did not increase the power and duties of "an existing office" but created a new office to which these powers were transferred. It is the removal of these powers and duties from commissioned military officers, not their addition thereto, which renders inapposite the lead opinion's no-"new-office" argument.

I also find that the lead opinion grossly misapprehends the nature of the duties of a military judge and his contribution to military justice. The creation of the military judge in 1969 was a watershed event because it introduced for the first time, statutorily, *a professional judiciary* at courts-martial.[6] S.Rep. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968). *See* Ervin, *The Military Justice Act of 1968*, 45 Mil.L.Rev. 77, 83, 88-91 (1969). *See*

[6] The establishment of the military judge was not the only change accomplished by the legislation of 1968. Also, for the first time in the history of American military justice, a service-member could be tried and sentenced by a single military officer without court members in serious non-capital cases. Art. 16(1)(B), UCMJ, 10 USC § 816(1)(B). *See* H. Moyer, *Justice and The Military* § 2-620 at 536 (1972); Douglass, *The Judicialization of Military Courts*, 22 Hast. L.J. 213, 220 (1971).

Representative Philbin commented on the reason for this bill as follows:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from the military activity in Southeast Asia. Besides the savings in time and manpower afforded by the bill, the bill provides meaningful benefits and protections to the accused.
>
> The enactment of this legislation will permit the procedure for trials by special and general courts-martial to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the law officer, whose name is changed by the bill to "military judge," so that his judicial stature and authority in the courtroom will more closely approximate that of a civilian trial judge. The bill allows the military judge to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law. The bill provides for pretrial and posttrial sessions to be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions. The bill provides for trial in special and general court-martial by a military judge alone without court members if the accused requests and the request is approved by the military judge. *These last two provisions are expected to save innumerable man-hours of line officers who would otherwise be required to be in attendance at courts-martial, as well as improving the internal efficiency of the justice system.*
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> * * * *

[Continued]

generally Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG.J. 125 (1969). In this context, a holding that this office is new is an understatement.

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[6] [Continued]

> *The enactment of this bill will be the most significant advance in the field of military justice since the enactment of the Uniform Code of Military Justice in 1951.*

114 Cong.Rec. 30563-64 (1968) (emphasis added).

Representative Bennett, a central figure in the development of this legislation, made this statement regarding the 1968 legislation:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from our present military activity in Vietnam. The bill provides meaningful benefits and protections to the accused, as well as streamlining procedures. The bill contains the following provisions, which are designed to increase the fairness of the military justice system: First, the accused must be afforded the right to be defended by a qualified lawyer at special courts-martial—heretofore such a right only existed in the case of general courts-martial; second, before a bad conduct discharge can be adjudged at a special court-martial, the accused must be represented by a qualified lawyer and the proceedings must be conducted by a "military judge"—a term I will discuss below—except where physical conditions or military exigencies prevent one from being obtained; third, the bill extends the time in which the accused can petition for a new trial from 1 to 2 years; and fourth, an accused faced with trial at summary court-martial can object to such an informal trial, at which time the convening authority must bring charges at a special or general court-martial or dismiss them.
>
> *The enactment of H.R. 15971 will permit the procedure for trials in the military to conform more closely to the procedures used in the Federal courts. The bill also enhances the prestige and effectiveness of the law officer, whose name is changed to "military judge." The role of the "military judge" will closely approximate that of a civilian trial judge:* he will rule finally on certain procedural matters and will hold open pretrial and posttrial sessions without the presence of the court for the purpose of deciding procedural questions. An accused can request a special and general court-martial by a "military judge" alone.
>
> The bill changes the name of the intermediate appellate agencies in the military from boards of review to courts of military review. The bill requires that the judges of these courts and of courts-martial be part of an independent judiciary. In addition, the bill authorizes a military form of release on bail pending appeal, the need for which has been pointed out in several recent cases.
>
> *The importance of this legislation cannot be overstated. It is particularly needed in Vietnam, as has been pointed out by General Westmoreland; for under the bill line officers will be free from the necessity of serving as court members in many cases; and many previously wasted man-hours will be saved because of streamlined procedures.*
>
> I think it is most significant that the House of Representatives, which fathered the Uniform Code of Military Justice, also initiated the action on this legislation and now has the opportunity to put the capstone on it. *The enactment of H.R. 15971 will be the most significant advance in the field of military justice since enactment of the Uniform Code of Military Justice. I heartily recommend the House approve the Senate amendments.*

114 Cong.Rec. 30565 (1968) (emphasis added).

Turning to the lead opinion's "germane duties" rationale, I also find its application in the present case unacceptable. *Shoemaker v. United States, supra*, is an exception to normal Appointments Clause practice, and a very narrow one at that. The lead opinion's extension of that case beyond its facts to permit the blanket investing of "legally trained" military officers with the office of military judge without compliance with the Appointments Clause is simply unprecedented. Strictly speaking, such an approach might be appropriate only if the "legally trained" military officers also held a specific presidentially appointed military justice office such as the Judge Advocate General of the Navy. *See* 10 USC § 5148.[7] Otherwise, the lead opinion's general-duties analysis, at least in my view, constitutes judicial activism.

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[7] Neither of the two cases cited in *Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), supports

In *Shoemaker*, the Supreme Court considered the devolution of additional duties not on commissioned military officers in general or on commisisoned military engineering officers. Instead, they devolved on military officers already holding a specific military or civilian office requiring a presidential appointment. *See* Thain, *Legislative History of General Staff of the Army of the United States* 3, 485 (1901). *See generally Hoeppel v. United States*, 85 F.2d 237, 241 (D.C.Cir.1936). One Rock Park Creek Commission member who was a military officer had been previously appointed by the President to the Office of the Chief of Engineers of the United States Army. *See* R.S. §§ 1094, 1151, and 1193 (1878), and 17 Op. Atty. Gen. 2, 3 (1881); *see generally* 1 Stat. 749 (1799) and 20 Stat. 151, § 13 (1878); *see also* 10 USC § 3036 (1956). The second, also a military officer, had previously been "detailed" by the President as the Engineer Commissioner for the District of Columbia. *See* Ch. 180 § 2, 20 Stat. 103 (1878); 26 Stat. 1113 (1890); *see also*

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a "commissioned officer" exception to the Appointments Clause or its general-military-duty rationale as created by the lead opinion.

The petitioner in *Smith v. Whitney*, 116 U.S. 167, 6 S.Ct. 570, 29 L.Ed. 601 (1886), was an officer of the Navy who was later *appointed by the President by and with the consent of the Senate*, as the "chief of the bureau of provisions and clothing and paymaster general in the department of the navy, with the relative rank of commodore." *Id.* at 168, 6 S.Ct. at 570.

The petitioner in *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 577 (1885), was an officer in the Navy who *was later appointed by the President, by and with the consent of the Senate* as "chief of the bureau of medicine and surgery in the department of the navy," which office carried the additional title of "surgeon general of the navy." *Id.* at 569, 5 S.Ct. at 1052. *See* 10 USC § 5137, Historical and Revision Notes, R.S. 421 and 426.

The Supreme Court's holding that these military officers could be court-martialed for offenses under the Articles for the Government of the Navy does not logically suggest that an additional presidential appointment was not required for their assumption of their more particular civil or military offices.

10 USC § 3534 (1956). Thus, the additional "germane" duty of membership on the Rock Creek Park Commission cannot be simply said to have generally devolved on a diffused pool of commissioned officers or commissioned officers with engineering training.

Second, the *Shoemaker* decision makes clear that this extraordinary application of the Appointments Clause rests on a conclusion that the new additional duties are "germane to the offices already held by them." 147 U.S. at 301, 13 SCt. at 391. More particlularly, the Supreme Court there said:

> It is true that it may be sometimes difficult to say whether a given duty, devolved by statute *upon a named officer*, has regard to the civil or military service of the United States. *Wales v. Whitney*, 114 U.S. 564, 569, 5 S.Ct. 1050 [1052]; *Smith v. Whitney*, 116 U.S. 167, 179, 181, 6 S.Ct. 570 [576, 577]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391 (emphasis added). The additional duties as a member of the Rock Creek Park Commission were particularly related to the military officers' office as Chief of Engineers of the United States Army and office as Engineer Commissioner for the District of Columbia. Clearly neither duty as engineer nor training as an engineer sufficed.

Appellate government counsel and various amici have also asserted that the duties of a military judge are "germane" to the various powers of a commissioned officer under the Uniform Code of Military Justice. These include the power to "quell quarrels, frays, and disorders" (Art. 7(c), UCMJ, 10 USC § 807(c)); make arrests (Art. 9(b), UCMJ, 10 USC § 809(b)); serve as an investigating officer (Art. 32, UCMJ, 10 USC § 832);

impose non-judicial punishments (Art. 15, UCMJ, 10 USC § 815); and serve as court-martial members at special courts-martial without a military judge (Art. 25(a), UCMJ, 10 USC § 825(a)). I do not consider a military judge's judicial duties similar to or within the sphere of the general military justice responsibilities of a line officer. Moreover, the latter duties are collateral and irregular and, therefore, also lack the specificity-of-office considered in *Shoemaker*.

Finally, the available lower court decisions applying *Shoemaker* simply do not support a broad military commission-promotion exception to the Appointments Clause for legally trained officers. The Court of Appeals for the Eleventh Circuit applied *Shoemaker* in the context of the "Investigating Committee of the Judicial Council of Eleventh Circuit." *See In the Matter of Certain Complaints Under Investigation*, 783 F.2d 1488 (11th Cir. 1986). It noted that the members of this committee were *sitting federal judges* already appointed by the President who were later selected for service *on this judicial committee* by the Chief Judge of the Circuit. It held:

> Their selection for service on the Committee does not gain them new positions in any meaningful sense; *to the contrary, service on a committee of the judicial council, when called upon, is merely an outgrowth of their existing responsibilities. See Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893) (*a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment, at least where the newly-added duties are "germane" to existing functions*). *See also* 28 U.S.C. §§ 291, 292 (the Chief Justice may designate and temporarily assign any circuit judge to act as a circuit judge in another circuit if necessary; chief judges of circuit courts may make similar designations and temporary assignments with respect to district judges and districts within their circuits); *id.* §§ 293-96.

783 F.2d at 1515 (emphasis added). A previously appointed judge is not the same as a previously commissioned officer who is simply "legally trained."

Judge Lamberth of the United States District Court for the District of Columbia also impliedly rejected the "legally trained" military-officer interpretation of *Shoemaker*. He said:

> The [Supreme] Court rejected this argument [that a commission member could not serve absent Senate approval], holding that:
>
> > As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that *Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.*
>
> *Id.* at 301, 13 S.Ct. at 391 (emphasis added).

The *Shoemaker* case is distinguishable from this case in two important respects. *First, the provision challenged in Shoemaker added certain duties to two offices; it did not confer additional responsibilities on any particular officer. Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from*

> *office after the commission was established, he would no longer have served on the commission*—the new Chief of Engineers or Engineer Commissioner would have taken over those duties. Here, however, Mr. Wall was designated the new Director of OTS. Although the position was given to him by virtue of his prior position, it was given to him.

Olympic Federal S & L Assn. v. Director, Office of Thrift Supervision, 732 F.Supp. 1183, 1192-93 (D.D.C.1990) (some emphasis added). Again, no mention whatsoever was made concerning their remaining status as military officer or their general training as engineers.

Lastly, *Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl.Ct. 700 (1985), provides an example of Congress' recognition and treatment of the *Shoemaker* problem. That decision notes that Congress, in constituting the United States Claims Court in 1982 by using trial judges from the old Court of Claims, expressly confronted a *Shoemaker* problem. Judge Merow provided the following footnote in his opinion:

> Thus, in discussing the constitutionality of the provision of Pub.L. No. 97-164 reconstituting the trial division of the Court of Claims into a United States Claims Court comprised of the trial judges of the Court of Claims, H.R.Rep. No. 96-1300, 96th Cong., 2d Sess. 23, n.25, states as follows:
>
> "Article III, section 1, of the Constitution explicitly empowers the Congress to ordain and establish inferior courts. Consequently, the only questions concern the relation between the power of Congress, under Article I, section 8, cl. 18, of the Constitution to alter, enlarge, or restrict the functions of existing federal officers and the requirement of the Appointments Clause, Article II, section 2, cl. 2, that appointments as officers of the United States be made in the manner prescribed by that clause. Stated differently,

> this involves a reconciliation of the Supreme Court's decisions in *Shoemaker v. United States*, 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), and *Buckley v. Valeo*, 424 U.S. 1, 118-36, 96 S.Ct. 612, 681-90, 46 L.Ed.2d 659 (1976). The earlier case stated the principle that Congress may, by statute, confer new duties on officers of the United States, at least where the new duties are 'germane' to their existing functions, without the necessity of reapportionment under the Appointments Clause. The lat[t]er holds that Congress may not itself appoint officers of the United States.
>
> "The Committee has concluded that the carry-over of the trial judges into the Claims Court is a modification of an existing position rather than a legislative appointment to a new one, governed by *Buckley*. The bill merely would confer 'germane' new duties and extend the tenure of the existing trial judges as permitted by *Shoemaker*, rather than create a new office."

8 Cl.Ct. at 702. Examination of the legislative history of Article 26 especially since 1968 reveals no similar statements by Congress concerning *Shoemaker*'s applicability to "legal trained" or untrained commissioned officers and the newly created position of military judge.

VII

Application to the Present Case

Finding the *Shoemaker* decision inapplicable, my final concern is whether the system of appointment of a military judge provided in the Uniform Code of Military Justice nonetheless meets the standards of Article II, § 2 of the Constitution. I have noted earlier that military judges are not technically "appointed" under the Code, and their being invested with office is a more complicated process than represented in the granted issue. In addi-

tion, I note that Major Pesik, the military judge who presided at appellant's court-martial, was a Marine, and the appellate court panel for this case was composed of both Navy and Marine officers.

Turning first to Major Pesik, he was commissioned an officer in the United States Marine Corps by appointment of the President, by and with the Advice and Consent of the Senate. 10 USC § 531(a); *see* 10 USC § 532 or § 593. In accordance with the normal course of events, he rose to the grade of major in the Marine Corps, some of his promotions requiring appointment by the President alone and some also requiring the Advice and Consent of the Senate. 10 USC § 624(c). At some point, with the approval of the Secretary of the Navy, he was designated "a judge advocate." 10 USC § 5587a. His assignment for duty as a judge advocate of the Marine Corps was made by direction of the Commandant of the Marine Corps. Art. 6(a). Moreover, he was certified by the Judge Advocate General of the Navy to perform the duties of trial and defense counsel detailed for a general court-martial. Art. 27(b). Later, he was certified as qualified to be a military judge and designated for detail as such by the Judge Advocate General of the Navy. Art. 26(b). Finally, he was assigned to duty at the Sierra Judicial Circuit by the Commandant of the Marine Corps on the recommendation of the Judge Advocate General of the Navy.

The Marine Colonel and Navy Captains on the Court of Military Review were also commissioned officers who were appointed by the President with the Advice and Consent of the Senate. Their promotions to these distinguished grades were accomplished by appointment of the President with the Advice and Consent of the Senate. They were constituted a court by the Judge Advocate General of the Navy and designated for detail to it by that same officer.

The bottom line is that none of these military judges was appointed to that position or a germane position by the President alone, the Courts of Law, or the Head of a Department.[8]

VIII

CONCLUSION

Duty to Inform

In summary, it is my view that a military judge is not only a military officer but an "inferior Officer" of the United States as provided for in Article II, § 2 of the Constitution. Congress under Article I, § 8 of the Constitution was fully competent to create such a military judicial position and empower the holder of this office to dispense justice to servicemembers at courts-martial. Having done so, however, it was further required by Article II, § 2 to provide that the person who fills this office be appointed by the President, a Court of Law, or the Head of a Department.

The reason that Congress has not provided for this type of appointment for military judges is not readily apparent. The lead opinion suggests that Congress, cognizant of the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 made a conscious decision that a second appointment by the President of a commissioned officer to perform these new court-martial duties was not necessary. Examination of the legisla-

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[8] The term "Heads of Departments" for purposes of the Appointments Clause has recently been defined by the Supreme Court to be a member of the Cabinet. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——-——, 111 S.Ct. 2631, 2642-43, 115 L.Ed.2d 764 (1991). "Courts of Law" are also defined in terms of their "exclusively judicial role." *Id.* at ——, 111 S.Ct. at 2645. Neither the Secretary of the Navy, the Commandant of the Marine Corps, nor the Judge Advocate General of the Navy meets either of these tests.

tive history of the statutes creating this position, however, offers no express support for this theory. *Cf. Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl.Ct. at 702 n. 1. Moreover, examination of the *Shoemaker* decision in light of the legislation creating the military judge suggests to me that this decision's rationale is inapplicable to the case at bar. *See Olympic Fed. S & L v. Office of Thrift Supervision*, 732 F.Supp. at 1192-93.

My own view is more consistent with congressional silence. The office of military judge was established in 1968 when the Supreme Court utilized a "mode of appointment" approach to the Appointments Clause. *See* Note, *Toward a New Functional Methodology in Appointments Clause Analysis*, 60 G.W.L.Rev. 536, 539-43 (1992); *cf.* Note, *Power of Appointment to Public Office Under The Federal Constitution*, 42 Harv.L.Rev. 426 (1929). In other words, an "inferior Officer" of the United States was a Federal office holder whose appointment Congress required be made by the President, a Court of Law, or the Head of a Department. *United States v. Mouat*, 124 U.S. 303, 8 S.Ct. 505, 31 L.Ed. 463 (1888). *See Hoeppel v. United States*, 85 F.2d 237, 241 (D.C.Cir.1936). It was not until 1976 in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, that the "mode of appointment" approach was jettisoned in favor of a functional duty approach to Appointments Clause questions. *See* Note, 42 Harv.L.Rev. at 544-52; *see also Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631. In my view, there is simply no doubt that a military judge's duties and responsibilities now qualify him as an "inferior Officer" of the United States.[9]

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[9] The Supreme Court has recently denied petitions for certiorari in two cases where this Appointments Clause issue was raised for the first time in that Court. *Bolado v. United States*, —— U.S. ——, 113 S.Ct. 321, 121 L.Ed.2d 242 (1992); *Allen v. United States*, —— U.S. ——, 113 S.Ct. 324, 121 L.Ed.2d 244 (1992). However, as the Supreme Court itself has consistently said, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923). *See generally* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 269-72 (6th ed. 1986).

The Remedy

Appellant has shown no specific prejudice to his case due to the failure to provide for compliance with the Appointments Clause. However, simple affirmance is not sufficient under the *de facto*-appointee rationale of *Buckley* and the *Northern Pipeline* cases. It is the duty of this Court also to point out the unconstitutional statutory deficiency as this opinion has done. It should be in Congress' hands to render appropriate legislation to fix this statutory deficiency. In the interim, the President could, based on the rationale in this opinion, direct the Head of the Department of Defense to start appointing military judges as necessary to perform military justice functions in the department. *See United States v. Matthews*, 16 MJ 354, 382 (CMA 1983). Thus, the Executive Branch's constitutional role in this area, as envisioned by the Appointments Clause, would be restored.

WISS, Judge (dissenting):

Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987),[1] has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Once the legal chaff is separated out, the grain of the related questions of law before this Court is quite clear:

First, in exercising its power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, clause 14 of the Constitution, is Congress exempt from the prescriptions of Article II, § 2, clause 2 of the Constitution—the Appointments Clause—regarding appointment of "Officers of the United States"?

Second, within the meaning of the Appointments Clause and the decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), do Articles 26 and 66 of the Uniform Code of Military Justice, 10 USC §§ 26 and 66, respectively, establish a distinct office of military judge?

Third, if so, does the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed.2d 170

[1] That is the only case in which the Supreme Court of the United States has granted plenary review of a decision of this Court, *see* Art. 67a, Uniform Code of Military Justice, 10 USC § 867a (1989); *see also* Art. 67(h)(1), UCMJ, 10 USC § 867(h)(1) (1983). There, the Court held that jurisdiction of a court-martial depended solely on the accused's status as a member of the armed forces, not on the "service connection" of the offenses charged. In doing so, the Court expressly overruled its decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), that had rested significantly on the historical viewpoint that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." *O'Callahan v. Parker*, *supra* at 268, 89 S.Ct. at 1688 (footnote omitted), quoted in *Solorio v. United States*, 483 U.S. 435, 442, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987).

(1893), permit the conclusion that the duties of that distinct office are "germane" to the duties either of military officers generally or "legally trained military officers" specifically, so that the Appointments Clause does not require separate appointment of some such military officers as military judges?

Today, a majority of this Court approves the present practice of appointment of military judges by officials[2] below the rank of those set out in Article II, § 2, clause 2 of the Constitution—the Appointments Clause. In doing so, however, I believe that the various opinions of my colleagues who join in that disposition improperly reconcile the two provisions of the Constitution that are in issue in the first question and incorrectly read the decisions of the Supreme Court of the United States on which answers to the second and third questions depend. Accordingly, I dissent.

I

Without question, the Constitution vested in Congress the powers to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); and "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14). Art. I, § 8. The critical question at the outset here is not Congress' authority to legislate in this area by constructing a military justice system and providing for trial and appellate military judges; rather, it is whether, in doing so, Congress is free from the facially unconditioned restriction of the Appointments Clause regarding how those military judges must be appointed.

The Chief Judge, particularly in Part IV of his opinion, thoughtfully treats the matter of deference to Con-

[2] One important dimension to the problem underlying this appeal is that it is not entirely clear *who* "appoints" military judges. As the separate opinion of Chief Judge Sullivan makes apparent, the answer is not the obvious first guess (the Judge Advocate General of each service) and is not consistent among the armed forces.

gress in its regulation of military affairs. *See United States v. Prive*, 35 MJ 569, 573-77 (CGCMR 1992). The Supreme Court has instructed that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981), quoted in *Solorio v. United States*, *supra*, 483 U.S. at 447, 107 S.Ct. at 2931. *See also Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986).

Deference, however, does not equate to abdication. The Supreme Court has recognized that, in light of Congress' regulatory powers over the military, constitutional rights might have application and meaning in the military different from the civilian community, *see, e.g.*, *Solorio v. United States*, *supra* 483 U.S. at 447, 107 S.Ct. at 2931. The Court, however, has never instructed that Congress' regulatory power is a talisman, in the face of which the remainder of the Constitution withers. Indeed, quite to the contrary, the Court stated in *Rostker v. Goldberg*, *supra*, 453 U.S. at 67, 101 S.Ct. at 2653:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

(Citations omitted.)

The Constitution's grant of regulatory power to Congress over military affairs is no more plenary than, for instance, its grant of power to Congress in Article I

"[t]o . . . provide for the . . . general Welfare of the United States" (§ 8, cl.1); or over Federal elections (§ 4); or "[t]o make all Laws which shall be necessary and proper for carrying into Execution" these and other powers specifically set out elsewhere in the Constitution (§ 8, cl. 18). When the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), was presented with the argument that appointment of members of the Federal Election Commission was pursuant to these plenary powers of Congress and, thus, not subject to the Appointments Clause, the Court responded:

> But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 [4 L.Ed. 579] (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.
>
> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. 424 U.S. at 132, 96 S.Ct. at 688.

I agree. There is nothing anywhere in the Constitution of the United States or in decisions of the Supreme Court that supports the notion that mandates of the Constitution do not penetrate the walls of the military enclave. Further, unlike application of certain individual rights to service-members, there is nothing about the Appointments Clause that requires a different application in a military context than it does in the rest of the United States.[3] Nothing could be plainer than that the Appointments Clause, by its own terms, does not except appointment to offices created under Congress' power to regulate the military any more than it excepts appointment to offices created under any of Congress' other numerous, plenary powers.

In short, as the Supreme Court succinctly stated in *Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2639, "Neither Congress nor the Executive can agree to waive this structural protection" of the Appointments Clause.[4]

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[3] Judge Crawford's attempt to distinguish between civilian and military judiciaries based on "military exigencies" is a strawman. Nothing in any of the other opinions in this case would have any untoward impact whatsoever on the ability of the Judge Advocate General to *tactically move and reassign* military judges or to meet the operational realities of a military in the field, as well as in the garrison. At the same time, there was no occasion of which this Court has been made aware that required any sort of *emergency appointment* of military judges resulting from deployment of our armed forces. Simply stated, Judge Crawford's implied alarm—that appointment of military judges by, say, the Secretary of Defense (*see* opinion, *infra*) somehow undermines the response capability of our armed forces in some manner that appointment by the Judge Advocate General does not—is a *false* alarm.

[4] Judge Crawford's constricted focus on the purpose of the Appointments Clause is a misstep off the cleared path of the law. As the Supreme Court of the United States unequivocally instructed in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991), the Appointments Clause not only involves the constitutional tug-of-war between the Executive and Legislative Branches but also ensures that

Accordingly, if the Uniform Code of Military Justice established a distinct office of military judge, appointments to fill that office must comport with the Appointments Clause.

II

In an effort to identify who are included as "Officers of the United States" and other "inferior Officers" within the meaning of the Appointments Clause, the Supreme Court has said:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine* [, 99 U.S. 508, 510, 25 L.Ed. 482 (1879)], is a term intended to have substantive meaning. We think its fair import is that *any appointee exercising significant authority pursuant to the laws of the United States* is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

Buckley v. Valeo, *supra*, 424 U.S. at 126, 96 S.Ct. at 685 (emphasis added), cited with approval in *Freytag v. C.I.R.*, *supra*, 501 US. at ——, 111 S.Ct. at 2640.[5]

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responsibility to make appointments to offices in the Executive Branch will not be delegated and diffused to a level below the very highest, responsive level of "the President alone," "Courts of Law," or "Heads of Departments."

[5] As the Chief Judge points out, *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), marked the first time that the Supreme Court used this approach of examining the functions and duties of a purported office to determine whether it was an Office of the United States. Prior to that decision, the approach was one that could fairly be characterized as rather circular: A position was an Office only if Congress required that the position be filled by the President, a Court of Law, or a Head of a Department. In other words, this "mode of appointment" approach essentially

Military judges are "established by Law," and their "duties and functions are . . . delineated in a statute"—specifically, Articles 26 and 66 of the Code. *See* 501 U.S. at ——, 111 S.Ct. at 2640. Further, their functions and responsibilities, as fully reflected in the Chief Judge's opinion, 36 MJ at 249-250, and prescribed in the statute and in the decisions of this Court, are leaps and bounds more than "ministerial tasks"; and "[i]n the course of carrying out these important functions, [military judges] exercise significant discretion." 501 U.S. at ——, 111 S.Ct. at 2640; *see* Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, The Army Lawyer 23 (Dept. of the Army Pamplet 27-50-239, October 1992). In my view, application of the Supreme Court's functional-duty analysis compels the conclusion that there is a distinct office of military judge.

The lead opinion concludes otherwise, after tracing the evolution of the law member to the law officer to the military judge. As to the final stage in this process, the plurality opines:

> The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82 Stat. 1336. *Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.*

36 MJ at 229-230 (emphasis added). This casual view of the functions and duties of military judges is not only demeaning; it is inaccurate.

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concluded that an Office was an Office when Congress *said* it was an Office by providing for appointment thereto consistent with the Appointments Clause. The functional-duty approach followed since *Buckley*, of course, is more consistent with the principle that even Congress cannot legislate in violation of the Appointments Clause, *see Freytag v. C.I.R., supra.*

First, the lead opinion itself acknowledges an *incredibly* important *addition* to the functions and discretion of the military judge over *any* other single official that previously sat at a court-martial: To sit, alone, as a court-martial and determine, alone, the issue of guilt and the sentence of a convicted accused in serious non-capital cases. This extraordinary power extends to convicting servicemembers of such serious felonies as murder and espionage and imposing any sentence other than death—including life imprisonment. Never before did any single member of the armed forces—the president of a court-martial or anyone else—have the statutory authority to perform this function.[6]

Second, the lead opinion omits to notice other important additions to the duties and responsibilities of a military judge that were not mere transfers from a president of a court-martial. For instance, prior to 1969, challenges for cause against a law officer or members of a court-martial were determined by the members collectively, *see* Arts. 41(a) and 51(b), UCMJ, 50 USC §§ 616(a) and 626(b) (1950), respectively, recodified as 10 USC §§ 841 (a) and 851(b) (1956), respectively; by contrast, after 1969, a military judge rules finally on all such challenges, *see* Art. 41(a) (1968). Additionally, as footnote 6 of the Chief Judge's opinion makes clear, Congress was aware of other important duties that were given to a military judge that, before, had not rested with any single official, *e.*g., " ' to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law,' " and " 'for pretrial and posttrial sessions to

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[6] The plurality's effort to minimize the remarkable nature of this change, by referring to the long history of "one-member" *summary* courts-martial, is off the mark. After all, the Supreme Court has held that a summary court-martial is *not even a criminal proceeding. Middendorf v. Henry*, 425 U.S. 25, 36-42, 96 S.Ct. 1281, 1288-91, 47 L.Ed.2d 556 (1976).

be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions.'" In sum, the role of the military judge "'will more closely approximate that of a civilian trial judge.'" *See* 114 Cong. Rec. 30564 (1968).

That is an *Office*.[7] *See Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2640. It is an Office that involves a full range and collection of judicial functions and duties that, prior to 1969, did not repose in any other individual in the military justice system.[8] This factual analogy is

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[7] In determining this question of whether there is a distinct office, the lead opinion reflects significance in subtleties of wording of Articles 26 and 66, and, by comparison, 67, UCMJ, 10 USC §§ 826, 866, and 867, respectively. I simply make these observations about that exercise.

The Supreme Court in *Freytag v. C.I.R., supra*, 501 U.S. at ——, 111 S.Ct. at 2640, initially noted as a predicate that the office there was one "established by Law" and then followed the functional-duty approach and focused on the "duties and functions" delineated in the statute. As to whether Articles 26 and 66 as a predicate establish an office of military judge by law, a comparison of those provisions with the statutes in issue in *Freytag* ineluctably lead me to conclude that Articles 26 and 66 pass muster to do so. *Compare* 26 USC § 7443A-Special trial judges ("The chief judge [of the Tax Court] may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." § 7443A(a)), *with* Article 1(10), UCMJ, 10 USC § 801(10) ("'[M]ilitary judge' means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26)."); Article 26(b) ("A military judge shall be detailed to each general court-martial."); and Article 66(a) ("Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.")

That predicate established, however, the real heart of the test relates to the nature and quality of the functions and duties of military judges delineated by those provisions; that inquiry is more fully addressed in my opinion, *supra*.

[8] The lead opinion points out that some of the functions and responsibilities that, after 1969, rest with the military judge earlier had been those collectively of the members of a court-martial. Without charting here the source of each of a military judge's duties, suffice to say that some earlier had belonged to members; some earlier had belonged to the president of a court-martial; and some earlier were non-existent—they were reposited for the first time in the office of military judge. Accordingly, I rhetorically ask the plurality: Does the fact that some (even assuming *most*, for this purpose) of the responsibility and discretion that now is lodged in *one* source actually came from *several* various sources in any way change the equation as to whether that *one* source now is an "office" under the functional-duty approach, *see* n.5, *supra*?

consistent with the plain language of the UCMJ, which expressly defines the military judge as "an official." Art. 1(10) (1969).

At the appellate level, the functions and duties of military judges are similarly imposing. A Court of Military Review exercises "awesome, plenary . . . powers." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). It is charged in every case it considers to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact," and it may in a given case "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c).

In other words, appellate military judges sitting on a Court of Military Review in each case hear and decide all *legal* issues arising from the proceedings below, satisfy themselves that the evidence is *factually* sufficient to sustain the findings, assure that the sentence is *legally* imposable, and determine anew whether the sentence is an *appropriate* one. In addition to these functions during the usual course of appellate review of a court-martial conviction, Courts of Military Review possess and have exercised extraordinary-writ powers where appropriate. *See Dettinger v. United States*, 7 MJ 216 (CMA 1979). *All* this is done without any second-guessing by any mili-

tary superior and is subject to review only within the judicial system, by this Court.

By any view, in my opinion, the functions of military judges at the appellate level, like those of military judges at the trial level, are substantially "more than ministerial tasks"; rather, they reflect the exercise of "significant discretion" as well as *final* judgment subject only to judicial review by a superior appellate court. *See Freytag v. C.I.R.*, *supra*, 501 U.S. at ——, 111 S.Ct. at 2640. Just as surely as I said earlier about military judges at the trial level, these functions and duties of appellate military judges leave no doubt in my mind that Congress created an office of military judge.

III

Relying on *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the plurality concludes that

> [a]ssuming, *arguendo*, that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer detailed as a military judge.

Thus, the plurality reasons, a new appointment is not required. 36 MJ at 246. I join the Chief Judge's reasoning in Part VI of his opinion that rejects both this reasoning and its reliance on *Shoemaker*.

Simply stated, *Shoemaker* was a situation in which the Supreme Court looked at the duties of two *particular*, high-level military engineers—the Chief of Engineers and the Engineer Commissioner for the District of Columbia —and concluded that the *additional* duties that Congress

purported to give them as members of the Rock Creek Park Commission were germane to their particular offices, so that a second appointment was not necessary. That is a far cry from the extrapolation that the lead opinion now makes: That devolution of specific and highly responsible judicial duties as a military judge is "germane" to some nebulous notion of duties of "legally trained military officers" in general. *Cf.* Criminal Law Note, *supra*, 36 MJ at 242. Analogizing in reverse back to *Shoemaker*, what the plurality affirms here would be akin to concluding that the responsible and discretionary functions and duties of the commissioners on the Rock Creek Park Commission were "germane" to duties of *any* military officer trained as an engineer. *Shoemaker* may not be read that broadly.

Finally, I view two significant provisions in the Uniform Code of Military Justice as contradicting the plurality's conclusion that duties of a military judge are germane to the duties of a military officer. First, as Articles 26(b) and 66(a) expressly require that a military judge at both the trial and appellate levels be "a member of the bar of a Federal court or . . . of the highest court of a State," military authorities do not have complete control over whether a military officer meets the statutory qualifications to be a military judge. Admission to the practice of law is controlled or regulated by state statute, court rule, or both, and requires comprehensive legal training not provided by the military and a determination of legal competence by the civilian authority. *See* 7 Am Jur 2d, Attorneys At Law § 12; American Bar Association, Comprehensive Guide to Bar Admission Requirements (1992-93). Because a service-member's admission to the independent bar by civilian authority is a statutory qualification for a military judge, I cannot conclude that duties of a military judge are germane to the general duties of a military officer, even a "legally trained" one.

Second, as the lead opinion acknowledges, Article 66(a) authorizes appointment of *civilians* as appellate military judges on the Courts of Military Review. The plurality purports to preclude the difficulty that this statutory provision creates with its germaneness theory, but it cannot be evaded. Whether civilians sat as judges in this case is not the point; rather, the pertinent inquiry is: What impact does this statutory authorization have on the interpretation of that statute as a whole relevant to whether the duties and functions of an appellate military judge are "germane" to duties generally of a military officer, even one "legally trained"? The express statutory provision for civilians on the appellate court is inconsistent with the plurality's germaneness theory. The plurality disregards this inconsistency; I cannot do so.

CONCLUSION

In summary, I conclude that Congress is not exempt from the strictures of the Appointments Clause of Article II, § 2, clause 2 of the Constitution when it exercises its powers under Article I, § 8, clause 14 of the Constitution to regulate the land and naval forces. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612. Considering the functions and duties of military judges, I conclude that Congress established a distinct office of military judge in Articles 26 and 66 of the Uniform Code of Military Justice, so the Appointments Clause must be complied with in filling that office. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631. Finally, I conclude that a prior general appointment as a military officer will not satisfy the Appointments Clause in this regard because the specific judicial duties required of the office of military judge—as opposed to duty as a military officer—are not "germane" to duties of a "legally trained" military officer in general. *See Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361.

Because a majority of this Court, on the other hand, is of the view that the present method of appointing military

judges meets constitutional requirements, I need not decide whether these appointments can be affirmed under the *de facto*-appointee rationale of *Buckley*, as discussed by the Chief Judge. 36 MJ at 256-257. I point out, though, that even that rationale has certain logical and legal limitations.[9]

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[9] The Chief Judge touches on some of these issues in Part VIII of his opinion in which he suggests the possibility of interim Presidential direction on appointments through the Secretary of Defense. In addition, the appropriate time for effecting statutory remedial action would be at issue. For instance, in implementing the *de facto*-appointee rationale in *Buckley v. Valeo, supra*, 424 U.S. at 142-43, 96 S.Ct. at 693, the Supreme Court stayed its judgment for a period of 30 days to afford Congress an opportunity to reconstitute the Federal Election Commission and, in the interim, allowed the commission to function *de facto*. Also, by analogy, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), which involved a jurisdictional void created by a ruling that a system of bankruptcy courts was unconstitutional, the Supreme Court delayed its mandate for several months to permit Congress an opportunity to implement remedial action. After the initial delay, 458 U.S. at 88, 102 S.Ct. at 2880, the Court granted a further delay of some 2½ months. 459 U.S. 813, 103 S.Ct. 199, 74 L.Ed.2d 160 (1982). *Cf. United States v. Matthews*, 16 M[illegible] 354 (CMA 1983) (in decision finding court-martial death-penalty sentencing procedures unconstitutional, mandate withheld for 90 days to allow opportunity to change those procedures in time for appellant's resentencing).

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

J. A. FREYER R. A. STRICKLAND JAMES E. ORR

UNITED STATES

v.

ERIC A. WEISS, 080 62 5296
Private (E-1), U. S. Marine Corps Reserve

NMCM 89 4189 Decided 31 January 1992

Sentence adjudged 19 September 1989. Military Judge: E. F. Pesik Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Schools Battalion, Marine Corps Communication-Electronics School, MCAGCC, Twentynine Palms, CA 92278-5020.

LT ROBERT E. WALLACE, JAGC, USNR, Appellate Defense Counsel.

LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel.

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel.

PER CURIAM:

We specified two issues [1] designed to enable us to examine the adequacy of counsel at the trial level in offering a pretrial agreement for no sentence protection, imposing on the Government the sole obligation to withdraw a questionable charge. In so doing, we recognized that the state of the record at that time was such that several matters, including the facts surrounding the withdrawn charge and the actual considerations motivating the pretrial agreement, were insufficiently developed. From their submissions, the parties have made no effort to augment the record with affidavits or other evidentiary material but have, instead, elected to rely on argumentative speculations. A subsequent conference with counsel has yielded no further submissions. We have elected not to indulge in argumentative speculations, and, therefore, with respect to the specified issues, we shall leave the parties where we find them.

The findings of guilty and the sentence, as approved on review below, are affirmed.

J. A. FREYER, Senior Judge

R. A. STRICKLAND, Senior Judge

JAMES E. ORR, Judge

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[1] I. UNDER THE CIRCUMSTANCES OF THIS CASE, WAS CHARGE I A VALID CHARGE? *See United States v. Osborne*, 9 U.S.C.M.A. 455, 26 C.M.R. 235 (1958); *see also United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988) (footnote 4).

II. IF THE ANSWER TO THE FIRST SPECIFIED QUESTION IS IN THE NEGATIVE, DID THE APPELLANT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE PRETRIAL AGREEMENT, WHICH PROVIDED NO CONSIDERATION FOR THE ACCUSED'S PLEAS OF GUILTY OTHER THAN WITHDRAWAL OF CHARGE I?

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 68237/MC
CMR Dkt. No. 91-1821

UNITED STATES,
Appellee

v.

ERNESTO HERNANDEZ (467-21-2959),
Appellant

ORDER

On consideration of the granted issue in the above-styled case in light of *United States v. Weiss*, 36 MJ 224 (CMA 1992) it is by the Court this 25th day of February, 1993

ORDERED

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

Judge CRAWFORD concurs in the result per her separate opinion in *United States v. Weiss*, 36 MJ 224 (CMA 1992).

Chief Judge SULLIVAN and Judge WISS dissent for the reasons stated in their separate opinions in *United States v. Weiss*, 36 MJ 224 (CMA 1992).

APPENDIX D

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

J. A. FREYER F. D. HOLDER R. M. MOLLISON

UNITED STATES

v.

ERNESTO HERNANDEZ, 467 21 2959
Lance Corporal (E-3), U. S. Marine Corps

NMCM 91 1821 Decided 17 March 1992

Sentence adjudged 16 April 1991. Military Judge: H. K. Jowers, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, FMF, Atlantic, Marine Corps Air Station, Cherry Point, NC 28533-6001.

LCDR RICHARD D. ZEIGLER, JAGC, USNR, Appellate Defense Counsel.

LT RALPH G. STIEHM, JAGC, USNR, Appellate Government Counsel.

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto, and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *United States v. Lowry*, 33 M.J. 1035 (N.M.C.M.R. 1991). The appellant, while returning with his squadron from a drug interdiction mission to Colombia, smuggled 11 kilos of cocaine into the United States aboard military aircraft. Ultimately, 10 of those kilos, having a street value of $1.7 million, were distributed by the appellant to his Colombian supplier's stateside confederate. The appellant and his co-conspirator received $60,000 for their efforts. Under the circumstances, the sentence was entirely appropriate. The period of suspension of a portion of that sentence was not unreasonably long inasmuch as the period of suspension was specified by the appellant's pretrial agreement and is nearly coextensive with the period of confinement that is not suspended. *See United States v. Snodgrass*, 22 M.J. 866, 870 (A.C.M.R. 1986),

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[1] I. AN APPROVED SENTENCE WHICH INCLUDES TWENTY YEARS OF UNSUSPENDED CONFINEMENT AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

II. THE CONVENING AUTHORITY'S PURPORTED SUSPENSION OF FIVE YEARS OF CONFINEMENT FOR TWENTY YEARS IS UNREASONABLY LONG, AND, THEREFORE, IS A NULLITY.

III. THE CONVENING AUTHORITY TOOK ACTION WITHOUT COMPLETE CONSIDERATION OF REQUIRED CLEMENCY MATTERS.

IV. THE STAFF JUDGE ADVOCATE FAILED TO PROPERLY ADVISE THE CONVENING AUTHORITY REGARDING APPELLANT'S SERVICE RECORD.

V. APPELLANT HAS BEEN DENIED EFFECTIVE POST-TRIAL REPRESENTATION.

pet. denied, 24 M.J. 234 (1987); Rule for Courts-Martial (R.C.M.) 1108(d), Manual for Courts-Martial, United States, 1984; Manual of the Judge Advocate General (JAGMAN) § 0158c. Although not assigned as an error by the appellant, it is noted that various specifications use terminology to the effect of "export into the United States," vice "import into the United States." Reviewing the entire record, however, we believe the appellant was not misled by the use of the former and at all times understood he was pleading guilty to importation of cocaine and conspiracy to commit same. *See, e.g., United States v. Bryant*, 30 M.J. 72 (C.M.A. 1990); *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988); *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202 (1953); R.C.M. 307(c)(3), Manual for Courts-Martial, United States, 1984. Accordingly, the findings and sentence as approved on review below are affirmed.

J. A. FREYER, Senior Judge

F. D. HOLDER, Judge

R. M. MOLLISON, Judge

APPENDIX E

Relevant portions of the Uniform Code of Military Justice (UCMJ)

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing

a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his

designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with

respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law *and fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may *weigh the evidence, judge the credibility of witnesses,* and *determine controverted questions of fact,* recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

APPENDIX F

Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

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(2)

No. 92-1482

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERIC J. WEISS AND ERNESTO HERNANDEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have a fixed term of office.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Weiss, Pet. App. 1a-85a, is reported at 36 M.J. 224. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 86a-87a, is unreported. The order of the Court of Military Appeals in the case of petitioner Hernandez, Pet. App. 88a, is not yet reported. The order of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 89a-91a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Weiss* was entered on December 21,

1992. The judgment of the Court of Military Appeals in *United States* v. *Hernandez* was entered on February 25, 1993. The petition for a writ of certiorari in both cases was filed as a joint petition on March 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner Weiss, a member of the United States Marine Corps, was convicted at a special court-martial of one count of larceny, in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 921. He was sentenced to three months' confinement, to partial forfeitures of pay for three months, and to a bad-conduct discharge. Petitioner Hernandez, also a member of the Marine Corps, pleaded guilty to two counts of possession, two counts of introduction, one count of exporting, and one count of distributing cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a, and to one count of conspiring to commit those offenses. He was sentenced to 25 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved Hernandez's sentence as adjudged, but suspended all confinement in excess of 20 years in accordance with the pretrial agreement.

Petitioners did not raise the questions presented in the Navy-Marine Corps Court of Military Review, which affirmed petitioners' convictions. Pet. App. 86a-87a, 89a-91a. Petitioners raised those claims before the Court of Military Appeals. In the case of petitioner Weiss, the Court of Military Appeals granted plenary review to address his claims and affirmed. *Id.* at 1a-85a.

Relying on its earlier decision in *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), petition for cert. pending, No. 92-1102, the court, without dissent, held that due process does not require military judges to have a fixed

term of office. Pet. App. 2a n.1. The court also rejected petitioners' Appointments Clause challenge to the judges on the trial courts and courts of military review. *Id.* at 3a-35a. Two judges concluded that an officer's assumption of duties as a military judge does not create a new "office" requiring a new appointment for each such judge, and that, in any event, the duties of any such office are germane to the duties that military officers already discharge. *Id.* at 8a-19a. Judge Crawford concurred in the result on the ground that the Appointments Clause does not apply to the military. *Id.* at 22a-35a. Chief Judge Sullivan and Judge Wiss dissented. *Id.* at 36a-85a.

In the case of petitioner Hernandez, the Court of Military Appeals summarily affirmed on the basis of its decision in *United States* v. *Weiss*. Pet. App. 88a.

ARGUMENT

1. Petitioners maintain that the military trial judge and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court.

a. There is no conflict among the circuits on the question presented by the petition. Only two appellate courts other than the court below have spoken on this subject; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992); *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992). No federal appellate court has ruled to the contrary.

b. Petitioners' claim lacks merit. The Appointments Clause does not bar Congress from authorizing the Judge Advocate General to select commissioned officers

in the military to serve as court-martial trial judges and judges of the courts of military review.

i. The Appointments Clause, Art. II, § 2, Cl. 2, provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States."[1] By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioners' view, military judges are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and therefore cannot appoint military judges. The short answer to petitioners' argument is that because the trial and appellate judges in their cases were officers of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

Military trial judges are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the services are primarily responsible for implement-

[1] The Appointments Clause provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

ing the UCMJ.[2] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[3] Consistent with that scheme, Article 26(b) of the UCMJ, 10 U.S.C. 826(b), provides as follows:

> A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal Court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

The trial judges in petitioners' cases were commissioned officers. Furthermore, each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President with the advice and consent of the Senate.[4] As a commissioned officer, a military trial

[2] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[3] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocate General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

[4] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] * * * shall be made by the President, by and with the advice and consent of the Senate."), 593

judge may be assigned to nonjudicial duties by the Judge Advocate General, as necessary to meet the needs of the service.

Like their colleagues in the trial judiciary, the judges of the Navy-Marine Corps Court of Military Review are commissioned officers in the Navy and Marine Corps and were appointed (at least originally) by the President, with the advice and consent of the Senate. By statute, Art. 66(a), UCMJ, 10 U.S.C. 866(a), the Judge Advocate General of the Navy selects the judges of that court, which reviews the judgments of the trial courts within the military justice system. As a matter of practice, the Judge Advocate General of the Navy has assigned to the Navy-Marine Corps Court of Military Review only those commissioned officers who are in the Navy Judge Advocate General's Corps and those who are designated by the Marine Corps as "judge advocate[s]" or "law specialist[s]." Congress has recognized this practice by limiting the types of officers who could be "judge advocate[s]." See Art. 1(13), UCMJ, 10 U.S.C. 801(13). Judges on the Navy-Marine Corps Court of Military Review are commissioned military officers, and may be assigned to nonjudicial duties by the Navy Judge Advocate General as he deems necessary to meet the needs of the service.[5]

(requiring Presidential appointment and Senate confirmation of military reserve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

[5] The portion of the governing statute, Art. 66(a), UCMJ, 10 U.S.C. 866(a), that authorizes the Judge Advocate General to assign civilians to serve on courts of military review is not at issue in this case. It is undisputed that no civilian has served on the Navy-Marine Corps Court of Military Review during the consideration of petitioners' appeals. Accordingly, the only question presented in this case is whether the Judge Advocate General of the Navy has in fact assigned judges to the Navy-Marine Corps Court of Military Review who are constitutionally authorized to exercise the duties of that office. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976).

ii. Under these circumstances, there is no merit to petitioners' Appointments Clause argument. It is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may

> increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer (In re Certain Complaints Under Investigation)*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment, at least where the newly-added duties are 'germane' to existing functions"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty as a trial judge is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the members of their command and are trained to enforce the civil and military law. Under the Uniform Code of Military Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every commanding officer is further authorized to impose certain "non-judicial punishment[s]," including restriction to quarters for no more than 14 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ,

10 U.S.C. 815. Every officer who convenes a general or a special court-martial assumes certain quasi-judicial duties in reviewing the sentences of those courts-martial he convenes. Art. 60, UCMJ, 10 U.S.C. 860. Any commissioned officer may serve as a military trial judge if he possesses the requisite qualifications for performance of that function.[6] Any commissioned officer on active duty is qualified to serve as a member on all courts-martial. Art. 25(a), UCMJ, 10 U.S.C. 825(a). Furthermore, a summary court-martial is composed of one commissioned officer, who need not possess the qualifications of a military judge. Art. 16(3), UCMJ, 10 U.S.C. 816(3).

Thus, not only does the Code anticipate that any qualified commissioned officer may perform the functions of a military judge at some point in his military career, but it also anticipates that any commissioned officer, even an officer lacking the qualifications of a military judge, may at some point be called on to perform judicial functions. The structure of the Code in this respect buttresses the proposition that the duties of a military judge fall within the general duties of an officer in the armed forces. Given the nature of the responsibilities inherent on becoming an officer within the armed services, the duties of a military judge are germane to the duties of a military officer. Petitioners' challenge to the qualifications of the military judges in their cases therefore lacks merit.

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[6] Article 26 of the UCMJ, 10 U.S.C. 826, provides in part that "a military judge shall be detailed to each general court-martial." Although the Navy also has elected to follow the procedures set forth under that provision for special courts-martial, the UCMJ provides that a special court-martial may be composed of either a military judge or a board of at least three members. Art. 16, UCMJ, 10 U.S.C. 816.

2. Petitioners also maintain that the Due Process Clause requires that military judges have a fixed term of office. Petitioners' claim is not materially different from the claim presented by the petitioner in *Graf* v. *United States*, No. 92-1102. We addressed that claim in our brief in opposition in that case, and we rely on that response here.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] We have supplied petitioners' counsel with a copy of our brief in opposition in *Graf* v. *United States*, No. 92-1102.

Nos. 92-1102 and 92-1482

In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ERIC J. WEISS AND ERNESTO HERNANDEZ,
Petitioners,

v.

UNITED STATES, *Respondent*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONERS' REPLY BRIEF

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONERS' REPLY BRIEF

These cases present related, recurring and important issues concerning the military trial and appellate benches. The Appointments Clause violation addressed in No. 92-1482 and the terms-of-office issue presented in both petitions have a synergistic, negative impact on judicial independence in the armed forces. The issues are ripe and properly presented. Both petitions should be granted.

1. The government's opposition in No. 92-1482 is much more significant for what it does *not* say than for what it *does* say. Nowhere does it suggest that the Appointments Clause issue is not an important one, or that the question is not properly and squarely presented. Nor does it suggest that there is any reasonable likelihood that a conflict in the Circuits will develop, or that there is any other reason to allow the issue to percolate further in the lower courts. Nor does it attempt to rebut our argument that the decision below would permit agencies to appoint staff attorneys as administrative law judges without complying with the Appointments Clause for that judicial office. And the opposition makes no effort to defend the position of Judge Crawford—that the Appointments Clause has no bearing on military appointments—even though she provided the decisive vote for the government in the court below.

Moreover, the government does not attempt to respond to our synergy argument—that the Appointments Clause and due process violations compound one another, especially because the Judge Advocate General, who is responsible for military prosecutors, also supervises and appoints military trial and appellate judges. Accordingly, the Appointments Clause violation is not simply a technical matter, but one which goes to the heart of the issue of independence of all military judges, both because of the dual role played by Judge Advocate General and because it is he, and not a politically accountable superior, who decides who shall serve as military judges, in which positions, and for how long.

2. In defending the result below, the government relies in No. 92-1482 almost entirely on the one hundred year old decision in *Shoemaker v. United States*, 147 U.S. 282 (1893), which involved a one-time challenge to a statute that added new, but germane, duties to an existing office, but which did not require the reconfirmation of the incumbent officeholders. Not only is that case factually distinguishable from the ongoing appointment of military judges at issue here, but it was decided long before this Court's modern Appointments Clause cases from *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), through *Morrison v. Olson*, 487 U.S. 654 (1988), and on to *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991). Rather than supporting a denial of certiorari, the slimness of the government's defense on this important issue provides an additional basis for concern and hence a need for review by this Court.

3. The two judges of the Court of Military Appeals who found that the Appointments Clause had been satisfied did so primarily because of what they saw to be the close relation between the office of military lawyer, whether or not serving in the pre-1968 position of "law officer," and the new office of military judge. But the government's defense of the result below in No. 92-1482 takes a more sweeping approach under which an initial appointment as a military officer, that admittedly meets the requirements of the Appointments Clause, validates any subsequent assignment as a military judge. Thus, under the government's analysis, an individual commissioned as a Second Lieutenant and assigned to an infantry platoon could be assigned as an appellate judge on a Court of Military Review, with no further steps required under the Appointments Clause.[1]

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[1] The requirements in UCMJ art. 26(b), 10 U.S.C. § 826(b) (1988), that a military judge be a member of a bar and certified by the Judge Advocate General, do not affect the Appointments Clause analysis since they are simply additional requirements for that office, but do not satisfy, or serve as a substitute for, the requirements of that Clause. Nor is the notion of an infantry officer being admitted to the bar far-fetched: scores of military officers go to law school at night while in the service, because of in-service or post-service opportunities.

If accepted, this argument would allow all agencies, not just the military, to shift personnel around without any regard for the Appointments Clause, once the person was duly appointed. While an appointment to an inferior office would not obviate Senate confirmation, nothing would prevent the President from reassigning a duly confirmed Assistant Secretary of State for Latin America to cover the Near East or from being designated Ambassador to Russia, or bar the Assistant Attorney General in charge of the Civil Rights Division from being assigned to head the Criminal Division. Indeed, even the unstated limitation on inter-agency reassignments that the Court of Military Appeals' plurality imported through its requirement of germaneness would evaporate under the government's "one confirmation covers all" approach to Appointments Clause issues. While the government purports to retain the concept of germaneness, Weiss Opp. 9, its view that the duties of all military officers are germane to the duties of a military trial or appellate judge robs the term of virtually any meaning, and surely expands it far beyond that given by the plurality below or by this Court in *Shoemaker*.

4. Turning now to the other question presented, respondent, like the court below, has made no effort to show that military exigencies preclude fixed terms of office for military judges. The government has thus abandoned the one justification it even attempted in the lower court—that the allegedly ephemeral nature of courts-martial prevents the use of fixed terms. This retreat requires that it defend on the more fundamental ground that due process tolerates reliance on at-will judges in *any* system of criminal justice. But the government has also failed to offer any meaningful defense of this proposition. Thus, it blandly notes that "|s|tates are free to select terms of office for persons who hold any such position." Graf Opp. 7. This formulation, of course, does not address whether the states are equally free to decide to give their judges *no*

fixed term at all, as the military does. The petition in No. 92-1102 surveys the cases, Graf Pet. 9 n.9, 14-15 & n.18, and stands unrebutted. It is not enough simply to proclaim that the military is "a specialized society separate from civilian society," Graf Opp. 7, and deem the discussion at an end.

5. Equally conspicuous is the absence of any effort by the government to show that the practice here at issue satisfies *Mathews v. Eldridge*, 424 U.S. 319 (1976). Rather, the government places all its eggs in the basket of *Medina v. California*, 112 S. Ct. 2572 (1992), even though it also argues that Fifth and Fourteenth Amendment due process are fungible because both clauses employ the same four-word formula. Graf Opp. 7 n.5. There are two problems with that argument. First, it fails to explain why the Court was as divided as it was in *Medina* and why the Court of Military Appeals thought it made a difference and suggested a need for clarification. Second, Fourteenth Amendment jurisprudence, including *Medina*, reflects the special role of federalism—a factor that is entirely irrelevant under the Fifth Amendment. Because of this important distinguishing feature, the balance ultimately struck may be somewhat different in Fourteenth Amendment cases. If there is an anomaly in any of this, it would lie in subjecting noncriminal federal actions such as those involved in the work of Social Security Administration administrative law judges to stricter due process scrutiny than felony cases such as Airman Graf's court-martial.

6. The military's judicial arrangements—not dictated by any statute—are a dramatic and obvious departure from the norms of our legal tradition. Graf Pet. 9, 13-17. Following in the Court of Military Appeals' footsteps, the government pitches its argument on the proposition that "|f|or more than 300 years, neither English nor American military judges have enjoyed tenure in that office." Graf Opp. 6. As we have already explained, however, the office

of military judge only dates to 1968. Graf Pet. 8 n.7, 13 & n.14. Indeed, the very treatise relied on by the government long ago pointed out that "the judge advocate in our procedure [is] *neither a judge*, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the Court, and a recorder" (emphasis added). William Winthrop, *Military Law and Precedents* 179 (2d ed. 1920). The limited function of the "judge advocate" as a mere advisor to the court-martial members is clear from Colonel Winthrop's description. *Id.* at 194. That advisory function is–a far cry from the decisive power expected to be exercised by federal and state judges and, at least since 1968, by military trial and appellate judges. Because the "judge advocate" of olden days was no more a judge than the Solicitor General is a general, the history cited by the government and the court below is of no value in determining what due process requires.[2]

The government gains even less ground from *Herrera v. Collins*, 113 S. Ct. 853 (1993), because in fact that decision directly supports petitioners' due process argument. There, in determining the application of due process to Texas's new trial practice, the Court went far beyond that one state's jurisprudence, surveying English,

[2] The government's statement of the case in No. 92-1102 implies that Airman Graf was not harmed by the systemic defect because he elected to plead guilty and be sentenced by the court-martial members instead of the judge. Graf Opp. 4 (¶ 3). The implication is irrelevant because prejudice need not be shown in cases involving systemic defects. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); *see* Graf Pet. 7 n.5. In any event, the trial judge was much more than a mere spectator. He made a variety of important rulings, framed instructions for the sentencing phase, regulated the taking of evidence and the conduct of argument, and generally did the kinds of things a trial judge does during that important stage of a case. Airman Graf also had a right to Court of Military Review judges who were independent. Notwithstanding his guilty plea, they still had a duty to review his legal arguments and to determine whether his sentence was appropriate. UCMJ art. 66(c), 10 U.S.C. § 866(c) (1988).

colonial, early and current state practice, early federal legislation, and the evolution of Fed. R. Crim. P. 33. *Id.* at 864-66. This is precisely the kind of broad, multijurisdictional inquiry petitioners suggest, Graf Pet. 13-17, and precisely what the Court of Military Appeals and the government have refused to do. If *Herrera*'s unwillingness to confine the due process analysis only to the *Texas* law of new trials illustrates the correct use of legal tradition under *Medina*, the decisions below clearly do not.[3]

7. The government advances a superficially appealing textual argument which, upon analysis, proves to be entirely untenable. It suggests that since the Constitution elsewhere prescribes particular terms of office for the President, Vice President, Senators, Congressmen and Article III judges, due process cannot make any terms-of-office demands for other officials such as military judges. Graf Opp. 6 & n.4. If the Constitution were read in the cramped fashion suggested by this *expressio unius* argument, none of the specific guarantees of the Bill of Rights would ever have been applied to the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Nor would Fifth Amendment due process have been found to contain an equal protection component, since that concept appears *in haec verba* only in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, because the Contract Clause applies on its face only to the states, the government's mechanical approach would preclude finding an analogous restriction on the federal government in Fifth Amendment due process. Yet the cases recognize such a restriction, even though the Framers explicitly refused to subject federal legislation impairing private contracts to the

[3] *Herrera* is also noteworthy because the Court correctly found the states' present practices too divergent to count for much in the due process equation. In sharp contrast, as far as we can determine, no state uses at-will judges in felony cases.

literal requirements of the Contract Clause. *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 & n.9 (1984) (proposal to extend Contract Clause to federal government failed for lack of a second at 1787 Convention).

8. Finally, the government relies on what it describes as "Congress's decision not to grant tenure to military judges." Graf Opp. 10. Congress has made no such decision. The government cites nothing to indicate that Congress made any specific determination as to the need for terms of office when it created the military bench. Congress later commissioned a study of the matter, among others, Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b)(1)(D), 97 Stat. 1404, but has yet to hold a hearing on the subject. Because of the divers plausible explanations for the lack of congressional action,[4] it is improper to draw inferences from it one way or the other. *E.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Girouard v. United States*, 328 U.S. 61, 69 (1946). In any event, even if Congress's inaction were properly viewed as a "decision" to approve the services' practice of requiring military judges to serve without the protection of fixed terms, that would not absolve this Court of its duty to enforce the Constitution's guaranty of due process.

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[4] These include "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting),

CONCLUSION

For the foregoing reasons and those previously stated, certiorari should be granted and the cases should be consolidated for argument.

Respectfully submitted.

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APRIL 1993

(4)

No. 92-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED*

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as military trial and appellate judges, because their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?

*All parties to this proceeding are listed in the caption.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), is reprinted as Appendix A to the Petition, Pet. App. 1a-86a. The unpublished decision of the Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at Pet. App. 86a. The unpublished decision of the Court of Military Appeals in *United States v. Hernandez*, No. 68237/MC (C.M.A. Feb. 25, 1993), is reprinted as Appendix C at Pet. App. 88a. The unpublished decision of the Navy-Marine Corps Court of Military Review in *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1992), is reprinted as Appendix D at Pet. App. 89a-91a. The opinion of the Court of Military Appeals in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), on which that Court relied entirely in *Weiss* in deciding the second question presented in this case, is reprinted in the Appendix to the Petition for a Writ of Certiorari in *Graf*, which is pending in this Court (No. 92-1102) ("*Graf* App.") at 1a-42a.

JURISDICTION

On December 21, 1992, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Weiss*. On February 25, 1993, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Hernandez*. Jurisdiction in this Court is based on 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Articles 6, 16, 26, 37 and 66, 10 U.S.C. §§ 806, 816, 826, 837, and 866 (1988), are set forth as Addendum A to this brief. Unless otherwise indicated, all references to the UCMJ are to the 1988 U.S. Code.

STATEMENT OF THE CASE

This case raises two closely related questions that go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions and sentences. All military trial judges and almost all appellate military judges are commissioned lawyers on active duty in their services. Unlike Article III judges, and most other judges appointed under Article I, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges.

Instead, military judges are selected and appointed by the Judge Advocate General of their service, who is the senior uniformed lawyer in each armed service (other than the Coast Guard, where the position is held by the General Counsel of the Department of Transportation). As such, he is in charge of all military legal officers, who are referred to as "judge advocates," and is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice ("UCMJ") Art. 6(a), 10 U.S.C. § 806(a). In the Navy the work of the Judge Advocate General's Corps is assigned to six separate divisions, only three of which are involved in this case: military justice (which includes both prosecutors and defense counsel), the Navy-Marine Corps Court of Military Review, and the trial judiciary. *See* Office of the Judge Advocate General Organization Manual, JAGINST 5440.1 (1991) ("JAG ORG. Manual").[1] Because the Judge Advocates General have virtually unreviewable discretion to remove or transfer military judges, those judges lack protection if their decisions do not suit their superiors.

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[1] For the convenience of the Court, a copy of the JAG ORG. Manual, along with other documents that are not readily accessible to the Court, are being lodged with the Clerk and will be identified by "(L)" following their initial citation.

Thus, the issues before the Court are whether the method of appointment to judicial offices in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. *Institutional Framework*.

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five judges appointed from civilian life by the President with the advice and consent of the Senate for fixed terms of fifteen years. UCMJ Art. 142, 10 U.S.C.A. § 942 (West Supp. 1993). The appointment and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are 31 full-time appellate military judges, who may be either military officers or civilians and are appointed by the Judge Advocate General of their service. The Chief Judge of the Navy-Marine Corps Court of Military Review, which decided petitioners' cases, is chosen by the Judge Advocate General and reports directly to him. UCMJ Art. 66(a), 10 U.S.C. § 866(a); JAG ORG. Manual §109. In addition, the Navy Judge Advocate General prepares the annual fitness reports for the judges of that court, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although all of the Courts of Military Review are permanent courts, located in the Washington D.C. area, none of the judges is appointed to a fixed term of office.

Nine appellate judges, all military officers, sit on the Navy-Marine Corps Court, but most cases, like petitioners', are decided by three-member panels. The Navy-Marine Corps Court, like those of the other services, has detailed rules to manage and regulate its docket and the attorneys who practice before it. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which

a death sentence, confinement of one year or more, or any type of punitive separation from the military is adjudged. UCMJ Art. 66(b), 10 U.S.C. § 866(b).

At the trial level, military judges preside over both special and general courts-martial.[2] Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, the Judge Advocate General of their service selects and appoints them as judges in accordance with criteria set by Congress. UCMJ Art. 26(a)-(c), 10 U.S.C. § 826(a)-(c). Like the appellate judges, trial judges have no fixed terms of office. *Id*. Naval trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who reports to and is supervised by the Chief Judge of the Navy-Marine Corps Trial Judiciary, who reports to the Judge Advocate General. JAG ORG. Manual § 110.

Each armed force assigns military judges as and when it sees fit. Judges often serve terms of two, three, or four years, but a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force. The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls duty assignments. *See* UCMJ Art. 6, 10 U.S.C. § 806.

A court-martial can try any offense committed by a member of the armed services regardless of when or where it took place or who the victim was -- the sole requirement is that the accused was on active duty in the military at the time

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[2] Currently, there are 74 judges from all of the services who are certified to preside at general courts-martial. The Navy has an additional 17 judges who are qualified to preside only at special courts-martial, and there are 6 to 8 Coast Guard law specialists who are certified for special courts-martial, but are not now serving in judicial billets. Together they represent approximately 3% of all judge advocates on active duty.

of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or a term of years, total forfeiture of pay and allowances, reductions in pay grade, and a dishonorable or bad-conduct discharge (or dismissal for officers). UCMJ Art. 18, 10 U.S.C. § 818. A bad-conduct or dishonorable discharge is a badge of dishonor for life and can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Hodges*, 22 M.J. 260, 263 (C.M.A. 1986). Special courts-martial may impose up to six months of confinement, forfeiture of up to two-thirds pay per month for six months, reductions in pay grade, and a bad-conduct discharge. UCMJ Art. 19, 10 U.S.C. § 819.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over federal civilian criminal trials. The drafters of the UCMJ wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. at 465, *Graf* App 38a. The military trial judge has far-ranging discretionary powers including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [of the court-martial panel] on questions of law and procedure which may arise," and to "exercise contempt power." UCMJ Art. 48, 10 U.S.C. § 848. Most significantly, since 1968, with the consent of the accused, military trial judges can sit without a court-martial panel and try a case just as a district judge would do. UCMJ Art. 16(1)(B), 10 U.S.C. § 816(1)(B), added by the Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335. In one respect the court-martial judge has even more discretion than does a district judge: he is not bound by the Federal Sentencing Guidelines. *See* 18 U.S.C. § 3551(a); Manual for Courts-Martial, United States, 1984 (the "Manual"), Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" UCMJ Art. 66(c), 10 U.S.C. § 866(c).

2. *Proceedings Below.*

Petitioner Eric Weiss plead guilty in a bench trial before the Honorable E. F. Pesik, sitting as a special court-martial. At the time of trial, Judge Pesik was a major in the Marine Corps, and was a general court-martial certified judge. Weiss was found guilty of larceny (shoplifting of a $9.00 racquetball glove) and was sentenced to three months of confinement, forfeiture of $1395 in pay, and separation from the service with a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion. Pet App. 86a.

Petitioner Ernesto Hernandez plead guilty to possession, importation, and distribution of cocaine before the Honorable H. K. Jowers, Jr., sitting as a general court-martial. At the time Judge Jowers was a colonel in the Marine Corps and Chief Judge of the Mid-South Judicial Circuit. This was Hernandez' first offense, he had an otherwise good record, and he had cooperated with the authorities. Nonetheless, he was sentenced to 25 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and separation from the service with a dishonorable discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion. Pet. App. 89a.

In *Weiss* the Court of Military Appeals agreed to consider whether the manner in which military trial and

appellate judges are appointed violates the Appointments Clause, and whether failure to appoint those judges to fixed terms of office denies an accused liberty without due process. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), rejecting the due process claim. Then, on December 24, 1992, a sharply divided court rejected Weiss's Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. Hernandez' case was affirmed on February 25, 1993, based on *Weiss*. Pet. App. 88a.

In order to garner three votes in *Weiss*, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. Pet. App. 5a.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968, and thus no new appointment was necessary. Pet. App. 9a. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" *Id*. at. 8a.

Judge Crawford eschewed the opinion of Judge Gierke and, writing for herself, concurred only in the result. She

decided that the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the armed forces. Pet. App. 22a. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), in which this Court held that no class or type of officer is excluded from the Appointments Clause because of the special nature of the office or the plenary power of Congress over the subject area. Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position both in its brief and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption from the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. Pet. App. 58a (italics in orginal). He recognized that what had occurred was no mere transfer of duties, but a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of all judge advocates from whose ranks military judges are chosen. Pet App. 83a.

The *Weiss* court did not revisit *Graf*, where it had overruled a due process objection to the lack of fixed terms of office for military judges. *Graf* had first rejected the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which this Court had used to resolve Fifth Amendment due process claims. *Graf* App. 29a. Instead, it used the seemingly less exacting standard enunciated in

Medina v. California, 112 S. Ct. 2572 (1992), which involved review of a burden of proof issue in a state criminal case. Second, *Graf* treated *dicta* from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office for judges. *Graf* App. at 34a-35a. It then announced a new rule that military judges could not be removed in retaliation for their judicial decisions, without explaining how that rule would work in practice, let alone how it would protect an accused, rather than a military judge. *Id.* at 38a. Nowhere did the Court of Military Appeals (nor did respondent in its opposition to certiorari in *Graf*) suggest that military necessity precludes fixed terms for military judges in peacetime.

SUMMARY OF ARGUMENT

There is no dispute that those who serve as military judges must be appointed in accordance with the Appointments Clause. Nor is there any doubt that those who now serve as military judges do not have a separate appointment under that Clause for those offices. Thus, unless their prior appointments as military officers suffice to enable them to perform the duties of military trial or appellate judges, the Appointments Clause has been violated.

Both respondent and the Court of Military Appeals have placed almost total reliance on this Court's 100 year-old decision in *Shoemaker v. United States*, 147 U.S. 282 (1893), where the Court rejected an Appointments Clause challenge to the assignment of additional closely-related, short-term duties to two existing offices. However, *Shoemaker* deals primarily with the one-time problem of adding duties to existing offices. Thus, it might have been relevant had a challenge been made on Appointments Clause grounds shortly after the duties of military trial and appellate judges were expanded in 1968, and those who had been in those positions continued in office without a new appointment, but it cannot

rescue respondent 25 years after the transition problem in *Shoemaker* has disappeared.

More important, this Court's Appointment Clause jurisprudence has advanced considerably since *Shoemaker*, and now focuses on the function that the office holder is performing when deciding whether the Clause applies and whether the person is a principal or inferior officer. Applying that functional analysis here leaves no doubt that a separate appointment is required because the positions of military trial and appellate judges are separate offices, distinct from those held by military officers in general, as well as by officers who primarily do legal work. This difference is clear from the UCMJ, which requires special qualifications for military judges, and from the Navy's own rules, which require separate appointments for Navy and Marine officers who serve as trial or appellate judges. In addition, the vast powers that military judges possess confirm that the office of military judge must be filled by an appointment that satisfies the Appointments Clause, which does not include the general military appointments that are made each year to tens of thousands of military officers.

The judgments below also must be reversed on due process grounds because trial and appellate judges have no fixed term of office and may be removed or transferred at any time. No other federal officer who performs a judicial function even remotely comparable to the vast powers exercised by military judges lacks the essential protection of a fixed term of office that due process requires. Indeed, so far as we have been able to determine, every state court judge who presides over felony cases, like those that come before special or general courts-martial, has *some* term of office protection to assure his independence.

Unlike prior cases involving the military before this Court, there has been no effort to defend the lack of terms of office on grounds of military necessity. Instead, the practice has been defended on the tautological basis that military judges have never had terms of office, and hence due process

does not require them. But due process is not determined solely by reference to the past practices of the challenged institution; rather, it embraces a far wider inquiry designed to assure, at a minimum, fundamental fairness. That necessitates an inquiry into what practices others follow and the practical consequences of the existing and proposed rules. On these issues, regardless of the precise test employed, the lack of terms of office cannot stand, especially since petitioners agree that due process would not forbid transfers from judicial offices based on such exigencies as war, insurrection, or demobilizations.

Either the Appointments Clause or Due Process violation alone would require reversal, but in combination they doubly undermine the basic right to an independent judiciary before an individual can be subjected to the possibility of serious punishment of the kind that a general or special court-martial can impose. Moreover, the fact that the person who controls the appointment and removal of military judges -- the Judge Advocate General -- is not a politically accountable civilian (except in the Coast Guard), and is, for all services, the head of its military justice system, greatly exacerbates the unfairness to the accused of the present system.

ARGUMENT
THE JUDGMENTS BELOW SHOULD BE REVERSED.

I. Military Trial and Appellate Judges Are Not Appointed By the Method Required by the Appointments Clause.

A. The Text and Purpose of the Appointments Clause Directly Supports Petitioners.

The Appointments Clause to the Constitution, Article II, § 2, Cl. 2, provides the exclusive method for the appointment of officers of the United States. Nonetheless, Judge Crawford, who cast the deciding vote in favor of respondent below, concluded that the Appointments Clause

does not apply to officers in the Armed Services, a view which the Solicitor General has refused to embrace both below and in his opposition to this petition. Moreover, as this Court observed in *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), "no class or type of officer is excluded [from the Appointments Clause] because of its special functions." *See also Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs"). Accordingly, the question before the Court is not whether the Appointments Clause applies, but whether it is satisfied by the current statutory scheme.

This Court has considered the Appointments Clause in a trilogy of cases beginning with *Buckley v. Valeo*. The most relevant discussion for this case is contained in *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991), which involved the appointment of "special trial judges" by the United States Tax Court. There the Court observed that the Appointments Clause "not only guards against . . . encroachment [by one branch against the other], but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 2638. It further recognized that the Clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint," which, the Court observed, does "not always serve the Executive's interest" because it "forbids Congress from granting the appointment power to inappropriate members of the Executive Branch." *Id.* at 2639. The beneficiaries of the Appointments Clause, said the Court, are "not those of any one branch but of the entire republic." *Id.*

The Court further explained that the intent of the Framers in limiting the appointment power was to "ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 2641. The Court went on to observe that it was the "Framers' conclusion that widely distributed appointment power subverts democratic

government" and that the Framers "recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power." *Id.* at 2642.

The Appointments Clause divides the universe of officers of the United States into two categories: principal officers, who must be appointed by the President with the advice and consent of the Senate, and other officers, referred to as "inferior Officers," who may be appointed by the President alone, the courts of law, or the heads of departments, where Congress so provides by law. There is a third category of persons employed by the Executive Branch, known as employees, who have less power than officers and who need not be chosen under one of the methods provided in the Appointments Clause. However, no one has suggested that military trial and appellate judges are mere employees, nor could such an argument plausibly be made in light of this Court's discussion of the differences between officers and employees in *Freytag*, 111 S.Ct. at 2640-41.

Normally, the first question to be asked under the Appointments Clause is whether the person is a principal or inferior officer, but, as this Court observed in *Morrison v. Olson*, 487 U.S. 654, 671 (1988), that line is "far from clear." In our view, military judges are principal officers under the test laid down in *Morrison* at 671-72. Thus, although they are subject to removal by higher Executive Branch officials (a matter raising rather than resolving constitutional questions, as we explain in Point II), they are not empowered only to perform "certain, limited duties;" they are not "limited in jurisdiction" except in the sense that all judges are so limited; and they are not "limited in tenure" as the Court used the term in *Morrison* to mean "appointed essentially to accomplish a single task." *Id.* Military appellate judges are the paradigm of principal officers since they are required to act independently, and their decisions are rarely reviewed in the Court of Military Appeals. While the decisions of military trial judges are subject to review by the

higher courts, that is also true for the rulings of the Tax Court. Nonetheless, in *Freytag*, this Court concluded that Tax Court judges were, in the view of the majority, members of a court of law within the Appointments Clause, or, in the view of the concurrence, members of an entity whose Chief Judge is the head of a department within that Clause. Under either approach, in order to be authorized to appoint inferior officers, judges of the Tax Court had to be principal officers, and, if they are, so are military trial judges, even if their decisions are subject to review by other judges.

Since, as we demonstrate below, the appointment of military judges does not satisfy even the inferior officer requirements, the Court need not decide the question, although Congress will be forced to face the issue if the Court strikes down the present system. Nonetheless, if military judges are principal officers, it is an even more serious transgression of the purposes of the Appointments Clause to have their original commissions substitute for an appointment to a principal office.

Even if military judges are inferior officers, their selection as judges does not satisfy the Appointments Clause. First, the Constitution requires that the method of selection of inferior officers be provided "by law," and there is no law specifically providing for any method of appointment of military judges: Congress never passed a statute specifically opting for this alternative method for appointing inferior officers, as the Constitution requires it to do. Second, apart from the absence of an applicable law, military judges are not appointed as judges by any of the methods provided for in the Appointments Clause. They are not chosen by the President or by a court of law, and their appointment by the Judge Advocate General of their Armed Service does not meet the requirement that the appointment be made by the head of a department, who in this case would be the Secretary of Defense, or, in the Coast Guard, the Secretary of Transportation. Thus, on its face, the Appointments Clause has been violated.

B. *Shoemaker* Does Not Support Respondent.

The answer of the United States and the Court of Military Appeals to this argument is not based on any language in the Appointments Clause or any other provision of the Constitution, but on a single decision of this Court, *Shoemaker v. United States*, 147 U.S. 282 (1893). Because *Shoemaker* plays such a central role in the government's claim, it is worth reviewing the facts before turning to the two paragraphs in the opinion dealing with this issue. *Shoemaker* arose under a statute that Congress passed to facilitate the creation of Rock Creek Park in Washington, D.C. In order to carry out its plan, Congress established a commission of five persons, three of whom were to be appointed by the President with the advice and consent of the Senate. The two remaining places were filled by designating the holders of two offices as *ex officio* members: the Chief Engineer of the Army and the Engineer Commissioner of the District of Columbia, both of whom had been appointed by the President with the advice and consent of the Senate. Shoemaker and others objected to the plan in part because, as neighboring landowners, they were going to be assessed to pay for the benefits to them from the new park. Therefore, they sought to prevent the plan from going forward using a wide variety of arguments, including that the two members of the Park Commission whose offices were named in the statute had not been separately appointed by the President and confirmed by the Senate for their positions as Park Commissioners. It was in the context of this effort to set aside the work of the Commission that the case reached this Court.

The Court swiftly rejected this and other challenges. As to the necessity of a second confirmation because the statute assigned new duties to existing offices, the Court concluded that

> we do not think that, because additional duties, germane to the offices already held [were added by Congress] it was necessary that [these two officers] should be again appointed by the president and confirmed by the senate. It cannot be doubted, and it has frequently been the case, that congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

147 U.S. at 301. The Court also examined the functions of the existing offices and the newly added duties and found that they "cannot fairly be said to have been dissimilar to, or outside the sphere of, their official duties." *Id.*

Before applying that germaneness analysis, as amplified by this Court's more recent Appointments Clause cases, the factual context of *Shoemaker* distinguishes it from this case for five reasons. First, the *Shoemaker* analysis has no applicability to the Courts of Military Review whose members need not be active duty officers. UCMJ Art. 66, 10 U.S.C. § 866. Thus, the two judges on the Coast Guard Court of Military Review who were civilians at the time of their appointment to that court had no prior valid "appointment" on which to rely. Since they were appointed under the same statutory scheme that applies to all other military trial and appellate judges, it is not sufficient to say, as the Court of Military Appeals did (Pet. App. 20a), that this is not a Coast Guard case.

Second, the position of Park Commissioner was expected to be temporary, and once the work of the Commission was done and Rock Creek Park established, the Commission would go out of business. Plainly, that is not the case for military judges. Third, if either of the two designated officers left his job, his replacement would be appointed by the President and confirmed by the Senate to a position which would include both the park and non-park duties. As a result, any Appointments Clause defect would last only as long as the two original *ex officio* members remained in their positions, in marked contrast to the military judge system in which the defect is perpetual.

Fourth, since the properly appointed officers constituted a majority of the Commission, the Court might have disregarded the technical defect and sustained their decisions against the challenge of those who sought to undermine the entire statute. Fifth, if the Court had ruled the other way, it would have meant that every time Congress wished to create even a temporary new entity within the Executive Branch and to include among its members persons already holding offices of the United States, it would have required each of those existing officers to appear before the Senate and be confirmed for his or her "new position." Accordingly, for all of these reasons, *Shoemaker* is readily distinguishable from this case and cannot form the basis of any widespread evasion of the Appointments Clause.

Despite these substantial differences, the two-judge plurality in the Court of Military Appeals nonetheless relied on *Shoemaker* for two related reasons. First, it claimed that there was no new office created when Congress amended the UCMJ to provide for military trial and appellate judges. Second, it found that the duties of military judges were germane to the duties of military lawyers, and hence any new duties resulting from the creation of military judges fell within *Shoemaker*. In opposing certiorari, the Solicitor General took what appears to be an even broader view: once a military officer is appointed by the President and confirmed by the Senate, that is sufficient to satisfy the Appointments Clause, regardless of what functions that officer later is called upon to perform in the military, including those of trial or appellate judges. (Opp. at 7-9).

The issue of whether Congress created a new office when it amended the UCMJ in 1968, or simply added germane duties to an existing office, need not detain the Court for long. Assuming that there were no such new office created, *Shoemaker* would simply allow the persons already serving in that office to take on new duties without being reappointed. Thus, applying *Shoemaker* to this situation would only have allowed those who had been properly

appointed as law officers prior to 1968 to continue in office until their successors were chosen, who would then have had to be properly appointed to the new office. That approach assumes that those who were serving in office in 1968 were properly appointed, a matter which this Court need not decide since there were no pre-1968 judges who sat in these cases, but it leaves open the issue of whether those who became military judges thereafter were required to be appointed under the Appointments Clause.

There is another reason why the Court of Military Appeals was in error in equating the office of military judge with that of a military officer, even one who is a judge advocate: the military itself treats these positions as separate offices. Thus, Article 26(b) of the UCMJ, 10 U.S.C. § 826(b), establishes additional criteria for military judges, which include membership in the bar of a federal court or the highest court of a state and being "certified to be qualified for duty as a military judge by the Judge Advocate General of the Armed Force of which such military judge is a member." Similarly, in 1968, when Congress replaced the Boards of Review -- the prior appellate mechanism -- it directed each Judge Advocate General to establish a separate Court of Military Review to handle the appellate functions. Furthermore, throughout the UCMJ, the Congress assigned to military judges alone many specific functions, which are discussed more fully *infra* at 22-23.

In addition, the Navy itself has recognized that military judges hold separate offices for which they are required to have separate appointments. For example, the Judge Advocate General has created a judicial screening board in JAGINST 5817.1 (L), which deals with the process of appointing military judges. In Section 4b, there is a discussion of nominations for "judicial appointments," and subsections (e) and (f) also refer to "appointments," although "assignment" is also used in those provisions. Finally, in Section 5, the Judge Advocate General makes it clear that the report of the Judicial Screening Board is advisory only and

does not affect the "statutory authority of the Judge Advocate General to make judicial *appointments*" (*emphasis added*).

Of equal significance is the fact that a separate oath of office has been held by the Court of Military Appeals to be a requisite for at least the judges of the Courts of Military Review before being entitled to perform their duties. *United States v. Elliott*, 15 M.J. 347 (C.M.A. 1983). Accordingly, the Navy-Marine Corps Court of Military Review's internal rules specifically provide that an oath must be administered before a person may perform the duties of an appellate military judge. Rule 2-5(g)(L). The Rule also prescribes the form of oath, the most pertinent provision of which reads "I, _____, having been duly appointed (the) an (Chief) appellate military judge, United States Navy-Marine Corps Court of Military Review . . .." *Id.* Similarly, Article 42(a) of the UCMJ, 10 U.S.C. § 842(a), requires an oath of office for military trial judges. We have reproduced as Addendum B to this brief form certificates used by the Navy for its trial and appellate judges, which make clear that the Judge Advocate General has "appoint[ed]" the individual to the judicial "office." Accordingly, this case involves a significant selection process by the Executive Branch, unlike *Shoemaker* where there was no such choice made, but simply an assignment by Congress of additional duties to two existing offices. Finally, the Navy has a formal screening board that makes recommendations to the Navy Judge Advocate General, who then makes the final judicial selections, a decision that he has described as "among [his] most important duties." JAGINST 5817.1, ¶ 2 (L). For those reasons, if, under *Shoemaker* the test is of whether the office of military judge is a separate office, the UCMJ, as well as the Navy itself, treat judicial offices differently from other billets held by commissioned military officers, and, therefore, that test has plainly been met

C. The Court's Functional Analysis in Appointments Clauses Cases Supports Petitioners.

Other relevant legal authority confirms that the attempt to shoehorn the facts of this case into the *Shoemaker* mold cannot succeed. Beyond the few words relating to germaneness in *Shoemaker*, there are no cases dealing directly with the question presented here. However, this Court's recent Appointments Clause jurisprudence has focused on the function of the person in determining whether there is an office of the United States that requires compliance with the Appointments Clause, and if so, whether the occupant is a principal or inferior officer. *Buckley v. Valeo*, 424 U.S. at 137-41; *Morrison v. Olson*, 487 U.S. at 671-72; and *Freytag v. Commissioner*, 111 S.Ct. at 2640-41. We believe that the same kind of functional analysis is the most useful way of determining whether a separate appointment is required.

The duties of the judges on the Courts of Military Review are set forth in Article 66 of the UCMJ, 10 U.S.C. § 866. Under the scheme of military justice, the Courts of Military Review are the only appellate tribunals to which most defendants have access, since review in the Court of Military Appeals is entirely discretionary, except for death penalty cases. UCMJ Art. 67(a), 10 U.S.C. § 867(a).[3]

In at least some respects, the powers of the Courts of Military Review exceed those of the normal appellate tribunal. Thus, under Article 66(c), a court "may affirm only such findings of guilt and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines on the basis of the entire record should be approved." This power is not simply to decide whether the decision below does not contain reversible error, but whether it is, in fact, correct, in whole or in part. Moreover, these courts can

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[3] In Fiscal Year 1991, the Court of Military Appeals resolved 170 cases on the merits, in comparison to the 5,183 cases that the four Courts of Military Review decided in that time. Annual Report on Military Justice, 34 M.J. LVII, LXXVII, CV, CXIX, CXXXIII, CXLII (1991).

review not only the propriety of a conviction, but also the sentence imposed. And the next sentence in subsection (c) specifically provides that in "considering the record, the court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." As this Court is well aware, the broad power of military appellate tribunals to review factual findings made by either a court-martial panel or the military trial judge far exceeds that of any federal appellate court and most, if not all, state courts as well. In essence, military appellate judges have the final say on the guilt, as well as the appropriate punishment, for every person convicted of a crime under the UCMJ. To say that persons who perform that function are no different from every other military officer or even other judge advocates, is simply to ignore the role that appellate judges play in the system of military justice.

As for military trial judges, while their decisions are subject to review by the convening authority and by the Courts of Military Review, their powers are substantial and wholly different from those of ordinary military officers and indeed substantially different from those of the "law officers" whom they replaced after 1968. The first and most significant change in 1968 was to allow the military judge to try cases without a court-martial panel. In the approximately two-thirds of all special and general courts-martial that are tried by judges alone, *see* Note, *Military Justice and Article III*, 103 Harv. L. Rev. 1909, 1911, n.17 (1990), the military trial judge decides guilt or innocence and exercises wide discretion in imposing sentence, especially since the Federal Sentencing Guidelines do not apply to the military.

In our view, those powers alone are sufficient to make the Appointments Clause applicable to all military trial judges, but there are a number of other important duties that such judges have which further demonstrate the need for compliance with the Appointments Clause here. These additional functions include conducting hearings and deciding

motions outside the presence of court-martial members (Art. 39); granting or denying continuances (Art. 40); deciding challenges of court-martial members for cause (Art. 41(a)); holding persons in contempt (Art. 48 and Rules for Courts-Martial 801(b)(2) & 809); ruling on all questions of law (Art. 51(b)); and instructing the members of the court-martial on the applicable law (Art. 51(c)).

According to the government, despite these very significant powers assigned to military judges and despite the fact that no one else in the military is permitted by law to perform them, the original appointments of military judges as commissioned officers are sufficient to satisfy the requirements of the Appointments Clause because all military officers have some responsibility for military justice matters, and hence the assignment to perform judicial activities is germane to their normal responsibilities (Opp. at 8-9).

The germaneness argument made by the plurality in the Court of Military Appeals seemed to be limited to pre-1968 law officers or at least judge advocates, but even that limitation would still significantly undermine the purposes of the Appointments Clause. Under that theory, for example, a trial attorney at the National Labor Relations Board could become an Administrative Law Judge there or, if his or her original appointment had been by the President with the advice and consent of the Senate, a member of the Board itself, with no further need for Appointments Clause compliance. Similarly, the head of the Civil Rights Division of the Justice Department could be moved to the Antitrust or Criminal Divisions, or be made a U.S. Attorney, and the Ambassador to Israel could be sent to Saudi Arabia or Syria, with no further presidential or Senate involvement. According to the analysis of the court below, all of these transformations would have passed the germaneness test and therefore would be constitutionally permissible.

Moreover, in Article 26(c) of the UCMJ, Congress dealt with the issue of germaneness in a manner that is inconsistent with the Court of Military Appeals' approach.

That provision specifically authorizes a general court-martial judge to "perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee." This congressional recognition of the difference between general court-martial trial judges and others in the military underscores the error in treating military trial and appellate judges the same as all other judge advocates.

While the lower court seemed to limit its findings of germaneness to those serving in the law section of the military, the Solicitor General in his opposition took an even more expansive view of germaneness, under which simply being a commissioned officer is enough, for Appointments Clause purposes, to allow an officer to serve as a military trial or appellate judge. One reason why respondent may have had to take this position is that, at least for the Marine Corps, from which the two trial judges and two of the six appellate judges in these cases came, commissioned officers are not commissioned as judge advocates, but are given unrestricted commissions. This can be seen from the promotion lists for both the trial judges, which list all those to be elevated to a given rank in one group (*i.e.*, "appointed"), with no differences based on whether they serve primarily as lawyers or infantry officers, *see* 136 Cong. Rec. S6023-24 (daily ed. May 10, 1990) (Lt.Col. Pesik) and 132 Cong Rec. 8082 (1986) (Col. Jowers), unlike the other services where promotions for judge advocates are made separately. 136 Cong. Rec. at S6023 (Army).

Moreover, the Solicitor General's opposition did not respond to the hypotheticals in our petition similar to those set forth above and made no attempt to limit or define germaneness. As a result, under respondent's approach, since military officers are appointed by the President with the advice and consent of the Senate, they can be assigned to a Court of Military Review even if they were infantry officers

at the time they received their commissions. This approach is wholly inconsistent with this Court's decisions in *Buckley* and *Freytag*, or with the Court's repeated recognition that principles of separation of powers, including the Appointments Clause, are "the central guarantee of a just government." *Freytag*, 111 S.Ct. at 2634. It also contravenes the purpose of the Appointments Clause -- to prevent Congress from "dispensing power too freely" -- and disregards this Court's admonition that the Appointments Clause is intended for the benefit "of the entire Republic." *Id.* at 2639. And it undermines the goal of the Framers to assure that "those who wielded [the appointment power] were accountable to political force and the will of the people." *Id.* at 2641. In short, in place of principles of governmental accountability, respondent would substitute a mechanical "once confirmed always confirmed" approach, at least insofar as military judges are concerned.

Moreover, under the approach proposed by the government, the second appointment would not be limited to a position within the same department. Thus, a lawyer in the Internal Revenue Service could become a special trial judge of the Tax Court, and a Department of Justice prosecutor could become a federal magistrate. In addition, individuals could be transferred in or out of the military, or among the Armed Services, all without any further action under the Appointments Clause. In fact, the government's argument with respect to germaneness is made at such a high level of generality that it might well sustain anyone being transferred any place within the government so long as the appropriate level of appointment was made in the first instance, albeit many years before.

There is one other factor that further undermines the government's position here. When Congress created the Courts of Military Review, it specifically authorized civilians to be members of those courts, and two persons currently on the Coast Guard Court of Military Review were not on active duty when they were appointed, although both were retired

military officers. While this is not a Coast Guard case, the fact that civilians could have sat on the appellate panels that heard petitioners' cases, establishes that Congress never gave thought to, let alone approved, respondent's *post hoc* rationalization that equates service as a military officer with service as a military judge, so that one appointment fits all functions and positions. Since civilians serving on the Courts of Military Review plainly cannot rely on this rationale, it is also unavailable to other military judges whose appointments have not otherwise complied with the Appointments Clause.

Finally, no policy justification has been suggested by the lower courts, respondent, or Congress to justify non-compliance with the Appointments Clause. Indeed, there is no indication that Congress ever considered the matter when it created military judges in 1968 and either believed that the Appointments Clause had been satisfied or was excused for some policy reason. *But see Buckley v. Valeo*, 424 U.S. at 134 ("[F]ears, however rational, do not by themselves warrant a distortion of the Framers' work "under the Appointments Clause"). In sum, there is no basis to exclude military judges from the requirement of a separate judicial appointment that satisfies the Appointments Clause. Since petitioners were neither tried nor sentenced by properly appointed trial judges, nor were their appeals heard by properly appointed appellate judges, the judgments below must be reversed, and their cases remanded for further proceedings.

II. The Lack of Tenure for Military Trial and Appellate Judges Violates Due Process.

Introduction

The second question presented is whether the military judges who preside at special and general courts-martial, and hear appeals from them, must have some fixed term of office in order to assure the independence necessary so that due process is satisfied in the major criminal cases that those courts hear. Petitioners do not seek an inflexible rule under which no military judge can ever be transferred or removed

from office either for cause or in response to specific military needs, such as the recent deployment of troops to Somalia. Nor do they argue that a particular term of office is dictated by the Constitution. Rather, they contend that, at a minimum, due process requires fixed terms of office for military trial and appellate judges that can be altered only for reasons such as wars or major reductions in force.

Under the present federal system, the terms of office of those persons who perform adjudicative functions in the federal government fall into three categories. First, there are the Article III judges who have life-time tenure, subject only to removal by impeachment, and a guarantee against any reduction in compensation. These requirements, which are the ultimate guarantees of judicial independence, are contained in the Constitution, and petitioners do not contend that the trial and appellate judges in their cases are entitled to them, as did the defendant in *Palmore v. United States*, 411 U.S. 389 (1973).[4]

Second, a variety of other persons perform judicial or quasi-judicial functions in the federal system, and virtually all of them have terms of office, subject to removal only for good cause, which gives them substantial independence, although less than Article III judges. Thus, the judges of the Court of Military Appeals serve 15 year terms, 10 U.S.C.A. § 942 (West Supp. 1993); bankruptcy judges are appointed for 14 years, 28 U.S.C.A. § 152(b)(West Supp. 1993); magistrate judges serve for eight years, 28 U.S.C. § 631(e); tax court judges serve for 15 years, 26 U.S.C. § 7443(e); judges of the District of Columbia serve for 15 years, District

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[4] Contrary to the view of the Court of Military Appeals in *Graf*, 35 M.J. at 463-64, *Graf* App. 55a, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), also has no bearing on this case since its statement concerning the absence of a term of office for military judges was descriptive only and was offered as a reason why former servicemen could *not* be tried by a court-martial; it was not a ruling on whether that absence was consistent with due process.

of Columbia Code §§ 11-1501 and 1502; administrative law judges serve for indefinite terms, removable only for cause, and after a hearing, 5 U.S.C. §§ 3105 and 7521; territorial judges are all now appointed for terms of 10 years, 48 U.S.C. § 1424b (Guam), § 1614 (Virgin Islands), and § 1694 (Northern Mariana Islands); and the commissioners of federal regulatory agencies that perform quasi-adjudicative functions, such as the National Labor Relations Board (29 U.S.C. § 153), the Securities and Exchange Commission (15 U.S.C. § 78d), and the Federal Trade Commission (15 U.S.C. § 41), all have terms of office of five years or more.

Finally, there are those, like military trial and appellate judges, who have no terms of office, and hence their independence is always open to substantial doubt. These include special trial judges of the Tax Court, 26 U.S.C. § 7443A, and administrative judges who perform functions similar to those of administrative law judges, but do so on matters of lesser significance. The latter are civil servants who enjoy many protections, but those do not include a term of office while serving as administrative judge. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 263, 341-46 (1992).

The test for determining whether a particular protection is required by the Due Process Clauses of the Constitution was enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976):

> our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews involved the question of whether an evidentiary hearing was required prior to termination of social security disability benefits, but this Court has relied on the *Mathews* test in a variety of other contexts, including several involving federal criminal procedural questions. *United States v. Raddatz*, 447 U.S. 667, 677 (1980). Most recently in *Burns v. United States*, 111 S.Ct. 2182 (1991), the Court ruled that it was impermissible for trial judges to depart upward from sentencing guidelines without previously notifying the defendant, finding that Rule 32 of the Federal Rules of Criminal Procedure should be read to require such notice because the failure to do so might raise due process problems, citing civil, administrative, and criminal cases. *Id.* at 2187. The dissent acknowledged that due process must be met and utilized the *Mathews* test to find that it had been satisfied. *Id.* at 2192-96.

Accordingly, we begin with our analysis using the three factors outlined in *Mathews*, and then explain why the Court of Military Appeals was in error in declining to apply *Mathews* in favor of this Court's decision in *Medina v. California*, 112 S.Ct. 2572 (1992). Finally we demonstrate that, regardless of which case applies, the lack of fixed term of office violates due process because, as our Anglo-American legal tradition makes clear, it is fundamentally unfair to a person charged with a serious crime to be tried before a judge who lacks the independence that a term of office supplies.

A. The Absence of a Term of Office Violates *Mathews*.

The first *Mathews* factor -- the private interest at stake -- strongly weighs in favor of a fixed term of office. General courts-martial can order confinement up to life imprisonment

and arguably can impose the death penalty.[5] Special courts-martial can impose confinement of up to six months in prison, and both special and general courts-martial can give punitive discharges which constitute a stigma for life, as well as an end to the individual's military career. Given the awesome power of courts-martial, there can be little doubt that the first factor is very much on petitioners' side.

The second factor -- the risk of an erroneous deprivation and the probable value of the additional safeguard of a term of office -- also favors petitioners. To be sure, it is impossible to quantify the added risks from having a judge who lacks a fixed term, but there is no real dispute between the parties that a defendant in a criminal case will have less risk of an erroneous conviction or of an unfair sentence where there is a bench trial, if there is an independent judge, with a fixed term of office to back up that independence. Such independence is particularly vital given the wide areas in which military trial judges exercise discretion that is largely unreviewable. *See infra* at 38-39.

The principal argument made by the Court of Military Appeals, and adopted by the government in its opposition in *Graf*, was not that independence is not valued, nor that an accused would not be legitimately concerned about the lack of independence of military judges, but that other assurances of independence sufficed. As we demonstrate more fully *infra* at 39-41, those protections are newly created, largely illusory,

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[5] In *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991), the Court rejected a challenge to the constitutionality of the death penalty under the UCMJ based on the absence of statutory authority for the presidential Executive Order on which the death penalty provisions were based. This Court denied a petition for a writ of certiorari in *Curtis*, 112 S.Ct. 406 (1991), with Justices White and Blackmun dissenting. Under UCMJ Art. 18, 10 U.S.C. § 818, a capital case cannot be tried by a military judge alone, so that if the death penalty were to be upheld, it could only be imposed by a court-martial panel. Nonetheless, the trial would be presided over by a military trial judge and appeals heard by military appellate judges, both of whom would lack terms of office.

and are almost certainly unavailable to the accused, even if they are theoretically available to military judges who choose to exercise them. Accordingly, the second factor also supports petitioner.[6]

As to the third factor -- the governmental interest in maintaining the present system -- respondent has put forth *no* justification, military or otherwise, for not providing a fixed term of office, other than the irrelevant truism, which even the Court of Military Appeals did not adopt, that each court-martial is convened separately, and hence terms of office for judges who preside over them would be impossible. Respondent's opposition in *Graf* took the position that it need not make any showing of necessity and that the lack of fixed terms of office is constitutional simply because military judges have never had them. The government has offered no argument, let alone evidence, that any kind of fiscal or administrative burden precludes terms of office. Many military judges in fact serve regular tours of duty, but they have no assurance of doing so. Of course, the needs of the military might preclude lengthy terms of office, but that hardly justifies the absence of any term of office at all.

This case is also not like *Middendorf v. Henry*, 425 U.S. 25 (1976), where Congress had carefully considered the

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[6] There is evidence that the UCMJ does not adequately insulate judges from potential pressure. For example, a 1984 study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which military judges were threatened with reassignment or actually reassigned because of their decisions. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). This may understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." *Id.* at 1374. A growing list of cases highlights the vulnerability of the military bench to improper influence. *E.g.*, *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

issue of whether counsel should be provided for summary courts-martial and decided not to do so because, as this Court found, counsel would extend the length of proceedings and consume undue military resources. *Id.* at 43-46. By contrast, here there is absolutely no evidence that, when Congress created the offices of military trial and appellate judges in 1968, it ever gave the issue of terms of office a moment's thought. *See* S. Rep. No. 1601 (Oct. 2, 1968), 1968 U.S. Code Cong. & Admin. News 4501, 4507-08 & 4514-15 (amending Articles 26 and 66, relating to military trial and appellate judges); H. R. Rep. No. 1481 (May 27, 1968). *Compare Rostker v. Goldberg*, 453 U.S. 57, 72-74, 79-81 (1981) (careful detailed congressional and public debate on the role of women in the military relied on to sustain men-only draft registration statute).

It is important to note how few organizational and administrative changes would be needed if fixed terms of office were the rule. Unlike most due process cases, in which the individual seeks an additional hearing, a right to cross-examine witnesses, or other safeguards not provided, fixed terms of office would not require a single alteration in the procedures for conducting of military trials and appeals. The only difference would be that those who are now serving as judges would have terms of office, instead of being subject to removal or transfer at any time. Indeed, cost, which is so often a factor relied on by the government, would almost certainly cut the other way since fewer transfers would reduce expenses to the government, not increase them.

Accordingly, applying the three-factor balancing test in *Mathews*, petitioners' rights to due process were violated by the lack of any term of office for the military trial and appellate judges who presided over their cases.

B. *Medina* Should Not be Applied in this Instance.

Instead of utilizing the *Mathews* balancing test, the Court of Military Appeals relied on this Court's decision in *Medina v. California*, which was decided after *Graf* had been argued and, as a result, was the subject only of supplemental briefing. Although this Court did not clearly spell out the differences between the two tests, *Medina* focused more on history and general levels of contemporary acceptability of a practice, rather than on the pragmatic balancing of the relevant interests in *Mathews*.

Medina was the culmination of a series of cases in which defendants in criminal cases, principally but not entirely arising in state systems, sought additional procedural safeguards through the Due Process Clause. *Medina* is typical of a group of cases in which the defendants sought to reverse state procedural rules on burden of proof, in that case on the issue of competency to stand trial. This Court rejected the defendant's efforts to apply *Mathews* in that context, relying instead on *Patterson v. New York*, 432 U.S. 197 (1977), another burden of proof case where the state placed the burden on the defendant to show extreme emotional disturbance as a partial defense to a charge of homicide.

The limited scope of the *Medina* line of cases can be seen from the views on this issue expressed by the Solicitor General in his briefs in this Court. Thus, in his brief *amicus curiae* in *Medina*, the Solicitor General discussed *Mathews* at great length, never suggesting that it was inappropriate for criminal cases in general, but simply arguing that it had not been used and should not be used for questions of burden of proof in criminal cases. Brief of the United States in No. 90-8370 at 18-26, and 19. Similarly in *Burns v. United States*, the government did not argue that *Mathews* was inapplicable, but only that its test "does not dictate a different result." Brief of United States in No. 89-7260, at 10-11. Therefore, the holding in *Medina*, that the state could constitutionally assign the defendant the burden of proof on mental competency to stand trial, was not a break from the

Court's prior reluctance to overturn similar rules on due process grounds.

What was new was the seemingly broad assertion that *Mathews* does "not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." 112 S.Ct. at 2576. In assessing the effect of this statement beyond *Medina*-type cases, it is noteworthy that in *Medina* neither the brief of the United States, nor that of any other party, urged the abandonment of *Mathews* as a general proposition or as applied to federal criminal law. And Justices O'Connor and Souter specifically urged the retention of *Mathews* as a "useful guide in due process cases." *Id.* at 2582.

Under these circumstances, we believe that the decision in *Medina* not to apply *Mathews* should be read as governing only those cases involving attempts to impose due process requirements through altering the burden of proof to favor the defendant, rather than as a general repudiation of *Mathews'* applicability in criminal matters. No member of this Court has suggested that all burdens of proof are exempt from due process challenges or has proposed repudiating *In re Winship*, 397 U.S. 358, 364 (1970), where the Court "explicitly" held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Indeed, last term in *Herrera v. Collins*, 113 S.Ct. 853, 859 (1993), this Court specifically reaffirmed *Winship*, while relying on *Medina* to find that there was no due process right to a new trial eight years after a conviction. Similarly, it also rejected a procedural due process objection to a state statute, relying on both *Mathews* and *Medina* within three paragraphs of each

other. *Heller v. Doe*, ___U.S. __, 61 U.S.L.W. 4728, 4733 (1993).[7]

For these reasons, *Medina* is distinguishable, and its language should not be construed to apply to the issue of judicial terms of office. To the extent that it can be read as the Court of Military Appeals did -- to make *Mathews* inapplicable to all criminal proceedings, state and federal -- the Court should reconsider that language since it was neither essential to the holding in *Medina*, nor argued there.

Finally, we cannot but note the irony of applying a less stringent standard to due process issues involving defendants tried by court-martial than the standards set forth in *Mathews*. *Mathews* was, after all, a case in which the right at stake was to an evidentiary hearing before social security disability payments were cut off. There was no question whether the individual would ultimately be entitled to such a hearing; the only question was when that would occur. In that context, this Court set forth a standard which the Court of Military Appeals and the government now say is too stringent to apply when the question is not simply when a hearing will take place, but whether trials and appeals in serious criminal cases will be measured by a due process standard less rigorous than in social security cases. Neither common sense nor any aspect of due process jurisprudence suggests such a difference in treatment, and, indeed, if greater protection is needed, it is plainly in this case, where a

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[7] Another group of cases in which the Court has been reluctant to rely on due process are those in which the defendant attempted to expand a right specifically protected by the Constitution. *See United States v. Lovasco*, 431 U.S. 783 (1977) (Speedy Trial Clause in Sixth Amendment); *Dowling v. United States*, 493 U.S. 342 (1990) (attempted expansion of Double Jeopardy Clause). That line of cases might apply if petitioners were seeking life tenure for military judges, but they obviously have no applicability to the far different question of whether the lack of any fixed term of office satisfies the standards of due process.

fundamental structural defect is at issue, rather than in government benefit cases like *Mathews*.

C. Regardless of the Standard, Due Process Has Not Been Satisfied.

Even if the right to have a judge with a term of office is a "procedural rule" or a "matter of criminal procedure and . . . criminal process" within the meaning of *Medina*, 112 S.Ct at 2576, 2577, nothing in *Medina* produces a different outcome here. At the outset we note that *Medina*'s willingness to give "substantial deference" was to "considered legislative judgments," *id*. at 2577, but in this instance, Congress made no judgment at all that terms of office are unsuitable. Thus, it did not include a specific prohibition against fixed terms in the UCMJ, or even by making clear its intention in the committee reports that it had ruled out fixed terms. Although the Court in *Medina* granted substantial deference to the state's judgment, it did not simply accept the rule, but instead considered a number of factors, including historical practice, the operation of the rule, judicial precedents, and contemporary practice, at least where there is a settled view, in determining whether the fundamental fairness required by the Due Process Clause had been met. *Id*. at 2577-78.

In applying that analysis, we begin with the purpose of a fixed term of office, which is to assure the independence needed to guarantee a fair adjudication. No one doubts the need for independence, nor that tenure in office is directly related to it. As this Court stated in *United States v. Will*, 449 U.S. 200, 218 (1980), "control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from forces within government." *See generally id*. at 217-21. Justice Frankfurter in *Wiener v. United States*, 357 U.S. 349, 356 (1958), referred to the lack of a term of office as "the Damocles' sword of removal by the President," and the plurality opinion in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982), stated that judicial

independence must be "jealously guarded," in that case through the "clear institutional protections for that independence" contained in Article III. And, as this Court observed in *In re Murchison*, 349 U.S. 133, 136 (1953), a "fair trial in a fair tribunal is a basic requirement of due process" which involves not simply the absence of actual bias but "even the probability of unfairness." *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (independent tribunal guards against "unjustified or mistaken deprivations" and "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeeding in which he may present his case with assurance that the arbiter is not predisposed to find against him"). That independence is threatened here because of the lack of a term of office, which can mean either loss of the right to be a judge, through decertification, or the transfer to another less desirable position. These kinds of potential "punishments" for conduct of which the government disapproves is precisely the kind of Sword of Damocles found disqualifying in *Wiener* and *Bowsher v. Synar*, 478 U.S. 714, 730-32 (1986).

Moreover, in assessing the potential for loss of independence, it cannot be overlooked that the persons with the power of removal or transfer are hardly disinterested bystanders. This is not a situation like those in which social security benefits are being handed out, or like cases before the NLRB, in which the Board is principally a referee between the competing parties with no real stake in the outcome. By contrast, a court-martial is convened by the military authorities, in the name of the United States, against the accused, because the accused is believed to have violated the UCMJ and should be punished for it. As this Court observed in *Middendorf v. Henry*, 425 U.S. at 46, the business of the military is to fight wars and not to try cases, and it is undoubtedly with this recognition in mind that Congress has included a number of provisions in the UCMJ designed to avoid the effect of command influence, a goal which the

"rigid structure of military authority makes . . . very difficult" to achieve. *Harvard Note*, *supra*, 103 Harv. L. Rev. at 1921. It is against this hierarchical military background that the question of fundamental fairness from the lack of terms of office must be analyzed.

We first examine the need for independence for military appellate judges. As noted in Point I, they have the power to review all factual and legal findings, including the power to overturn convictions and adjust sentences. The Courts of Military Review are the only mandatory review available to most persons convicted by a court-martial, and the Court of Military Appeals hears only about 170 cases per year, compared to the more than 5000 decided by all the Courts of Military Review. In the military system, it is the judges of the Courts of Military Review whose job it is to ensure that a trial was fairly conducted, yet without fixed terms of office, there is a substantial chance that their independence will be compromised.

The necessity for independence for trial judges is different, but perhaps even more compelling than for appellate judges because trial judges act alone. Appeals judges have strength in numbers; if they can persuade others to join them in an opinion, it is more difficult to retaliate against them. Even those who dissent are only a minority, and their actions have not overturned a conviction or reduced a sentence. But a trial judge who favors the accused is exposed, with no other judicial cover, and thereby becomes a candidate for an early, less favorable non-judicial assignment. *See* William H. Rehnquist, *Grand Inquests* 114-15, 125 (1992).

Independence for military trial judges is also important because so many of their rulings are highly discretionary and not subject to any meaningful appellate review. Running from matters such as whether to grant a continuance, to ruling on motions to suppress, to making factual findings at trials, to instructing the members of the court-martial panel, to ruling on such questions of evidence as whether there is undue prejudice from certain testimony, or whether to allow

additional cross-examination or further witnesses on the same subject, to the length and type of sentence imposed where the case is being tried by a judge alone, the military trial judge has enormous and largely unreviewable powers that make independence essential for a fair trial. No one seriously disputes the importance or practical unreviewability of most of these rulings. Yet a judge who lacks independence will be influenced, perhaps only subconsciously, to rule in a manner that will please those who can remove him from his judicial office.

The principal response by the Court of Military Appeals was not to downplay the importance of independence, but to suggest that means other than terms of office would satisfy due process. 35 M.J. at 450, 463, *Graf* App. 34a. That approach, which respondent embraced in its opposition to certiorari in *Graf* (at 9-10), is fundamentally flawed for several reasons. Among the safeguards cited were Article 6a of the UCMJ, 10 U.S.C. § 806a, which deals with "the investigation and disposition of charges, allegations or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." At best, that provision enables a military judge to obtain a hearing when he or she has been decertified as a judge, but it does nothing to prevent the far more common and subtle practice of punishing or rewarding judicial conduct by seemingly routine transfer orders. Nor does Article 98(1) of the UCMJ, 10 U.S.C. § 898(1), which makes it a crime to "knowingly and intentionally [fail] to enforce or comply with any provision of the [code] regulating the proceedings before, during, or after trial" afford any protection against the chilling effect of a lack of fixed terms. That provision has been aptly described as a "dead letter," Homer Moyer, *Justice and the Military*, § 3-361 at 780 (1972), and /is no more of a protection than are the proscriptions against command influence in Article 37, 10 U.S.C. § 837.

There are a number of other problems with the "safeguards" suggested by the Court of Military Appeals, but

there are two over-arching objections that conclusively establish their inadequacy. First, they depend on a military judge who is willing to come forward and charge improper conduct by his military superiors. Except in the most extraordinary of circumstances, that is a wholly unrealistic suggestion, but even if it were not, it would not deal with the much more pervasive and intractable problem, where the military judge is unaware that his or her specific decisions have been affected by the prospect of punishment or reward that the lack of fixed terms fosters.[8]

Second, and most significantly, those purported protections are designed to assist the judge who wishes to protest improper conduct by others. They do nothing to protect the accused who believes that the judge, willingly or unwillingly, has surrendered his independence in order to please his superiors. Whether there is ever any actual retaliation, whether the fear of retaliation is legitimate, and what percentage of military judges have those fears are not controlling or perhaps even relevant to the requirements of due process. The question before this Court is not whether particular military judges in particular cases have sufficiently lost their independence to deny a military accused the right to

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[8] The concerns that judges in the military system have are illustrated by an ethics inquiry from the Chief Judge of the Court of Military Appeals, whose members are appointed for 15 year terms by the President, to Circuit Judge Walter Stapleton, the Chair of the Judicial Ethics Committee of the Judicial Conference of the United States. The request was for advice about whether a sitting judge, who wished to be reappointed, should recuse herself from a case that was important to the Defense Department, which makes reappointment recommendations to the President. The correspondence, which is set forth in Addendum C to this brief, is less startling for the advice given -- recusal is advisable -- than for the fact that even the judges in the Court of Military Appeals should feel the pressure of command influence, thus raising the question of whether ordinary military judges, who have no term of office whatever, can ever "hold the balance nice, clear, and true" between the accused and the prosecution. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

due process. Rather the question is the more general one, whether the absence of fixed terms of office violates due process, and on that, this Court's words in *Bowsher v. Synar, supra*, 478 U.S. at 730, albeit in a different context, are fully applicable here: "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."

Respondent and the Court of Military Appeals also relied on the fact that judges in the United States or English military in 1791 never had terms of office, and hence due process does not require them. There are several responses to this position, the most important being that, if history were the sole criterion, the role for the Court would be solely to determine the past. To be sure, history plays a part in this inquiry, but nowhere near the decisive one that respondent and the Court of Military Appeals seemed to suggest, particularly for broad concepts like due process of law. This Court's admonition in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934) -- that the proposition that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them . . . carries its own refutation," -- is still good law, as evidenced by this Court's decision in *Herrera v. Collins*, 113 S.Ct. 853 (1993), where it examined a number of factors besides the historical record in deciding what due process required. It would be particularly inappropriate to lock in our concepts of due process for the military to what has transpired in the past since there is no prior analog to the post-1968 military judge.

Another defect in this approach is that the history relied on has been limited to military history, with no consideration given to the fact that the federal government, through Article III and various statutes, has preserved the independence of those who perform judicial or quasi-judicial functions outside the military by providing them either life tenure or substantial fixed terms of office. Thus, magistrate judges, bankruptcy judges, tax court judges, territorial judges,

members of independent regulatory commissions, and even administrative law judges all have terms of office, even though their powers are much less than those of military judges. Indeed, in concluding that administrative law judges were entitled to absolute immunity from suits for constitutional torts, this Court specifically relied on "the importance of preserving the independent judgment of these men and women." *Butz v. Economou*, 438 U.S. 478, 514 (1978). Surely, the judgment of military judges is entitled to no less.

As the briefs *amicus curiae* of the American Civil Liberties Union and of the United States Air Force Appellate Defense Division explain in detail, the tradition of life tenure or substantial terms of offices for judges is a long and venerable one in England, in the federal system, and in the states. Today, the virtually unanimous pattern is for state judges to enjoy either life tenure, tenure until a stated retirement age, or fixed terms of years. Daniel J. Meador, *American Courts* 91-97 (1991); National Center for State Courts, Conference of State Court Administrators, *State Court Organization* (1987); *see also* American Bar Ass'n, *Standards Relating to Court Organization* § 1.13 ("judges of each level of the appellate court system should serve therein on the basis of a permanent appointment or for a substantial term of years").

We know of no state in which appeals are heard, or felony cases are tried, by at-will judges. A handful of jurisdictions have trial judges who serve at the pleasure of someone else, but these rarities typically involve courts of extremely limited subject matter jurisdiction, whose judgments are subject to trial *de novo* in a court of record. *See, e.g., People v. Horan*, 556 P.2d 1217 (Colo. 1976), *cert. denied*, 431 U.S. 966 (1977). Even so, a number of state appellate courts have invalidated arrangements under which lower court judges served at the pleasure of an elective official or body. *E.g., Winter v. Coor*, 695 P.2d 1094, 1102 (Ariz. 1985); *compare Summers v. Thompson*, 764 S.W.2d 182 (Tenn.),

app. dismissed, 488 U.S. 977 (1988) (upholding retaliatory dismissal of at-will judge only because of court's limited power), *with State ex rel. Town of South Carthage v. Barrett*, 840 S.W.2d 895 (Tenn. 1992) (invalidating statute which permitted city to create municipal court with at-will judge). Thus, in contrast to *Medina*, where there was "no settled view" on the issue, 112 S.Ct. at 2578, there is unanimity that due process requires fixed terms of office for those who exercise powers comparable to those of military judges.

Petitioners recognize that there is always an argument that the military should be treated differently. Were this a case in which the military had offered specific reasons for the lack of a fixed term of office, we might have a different situation. But neither here nor in *Graf* has respondent made such a claim, nor did the Court of Military Appeals rely on military necessity in rejecting this due process challenge.

Although no military necessity defense has been raised, a few points are worthy of note about it. First, as to the Courts of Military Review, we are hard-pressed to imagine what necessity could justify any deviation from a fixed term of office. While it is conceivable that there may be some fluctuation in the number of appeals heard from time to time, that kind of problem can be handled by simply not filling vacancies when regular terms of office expire. And since all four courts sit in the Washington, D.C. area, presumably even a widespread shift in the location of military trials would not alter the geographic needs of the Courts of Military Review. In any event, there is nothing in the Due Process Clause that would preclude the military from physically relocating a group of appellate judges, either temporarily or permanently, to accommodate the needs of the military regarding the handling of appeals otherwise within the jurisdiction of a given court. In short, except for a possible justification for a reduction in force following a rapid decline in appeals, we can conceive of no reason why the judges of the Courts of Military Review should not have fixed terms of office.

As for military trial judges, there are two separate questions: whether the needs of the military might require them to be transferred to another judicial billet and whether the needs of the military might require that they no longer be judges, but assume another legal, but non-judicial position before their terms of office expire. As to the transfer issue, there would plainly be no constitutional objection to a term of office provision that included an exception for the kind of situation found in Operation Desert Storm, where military judges were needed because only a few members of the Armed Forces were previously stationed there. There would also appear to be no objection to eliminating a judicial position entirely because of unexpected needs elsewhere, provided that the decision was based on neutral criteria and not used as a punishment for judicial performance. *See* 5 U.S.C. § 7521, excepting from the hearing and removal for cause requirements for administrative law judges situations involving a legitimate reduction in force. Moreover, in considering the possibility that a claim of military necessity would justify the early transfer of a military judge on an "emergency" basis to a non-judical billet, there are only 91 lawyers who are currently assigned to try general or special courts-martial, which represents less than 3% of all military lawyers.[9]

Of course, it is not the responsibility of petitioners or this Court to draft a detailed code of possible exceptions to the term of office requirement. That is a job for Congress, working with the military, who together are capable of producing rules for terms of office that are sufficiently certain to assure judicial independence, without interfering with the legitimate needs of the military. We have offered these

[9] Ironically, the Judge Advocate General of the Navy has a term of office of four years, 10 U.S.C. § 5148(b), as do his counterparts in the Air Force, 10 U.S.C. § 8037(a), and the Army, 10 U.S.C. § 3037(a), although for the Army and the Air Force the terms are explicitly made subject to early termination, but only by the President.

comments on military necessity to show that the legitimate military needs can be taken into account without the wholesale abandonment of the term of office principle. There is simply no reason to assume that requiring terms of office will bring the military to a halt, especially since Congress and the military have never attempted to provide for terms of office, while maintaining military flexibility. For all of these reasons, terms of office for all military judges are not only reasonable and feasible, but are required by the Fifth Amendment's guarantee of due process of law.

III. The Power of the Judge Advocate General to Appoint and Remove Military Judges Exacerbates Both the Appointments Clause and Due Process Objections.

In the two preceding arguments, petitioners have established that there is a violation of the Appointments Clause, and that the Due Process Clause requirement of an independent judge has not been met because of the lack of term of office for military judges, in both instances without regard to the position of the person who appoints or removes the judges. Thus, for example, our Appointments Clause argument would be the same if it were an Assistant Secretary of the Navy who made the appointment, because only the Secretary of Defense (or perhaps the Secretary of the Navy) is the head of the department under that Clause. But at least in that situation, the person making the appointment would be a high ranking civilian who was independently nominated by the President and confirmed by the Senate for that position.[10]

But the Judge Advocate General, who actually appoints military judges, occupies a far different position. He is not

[10] Until Congress vests the power of appointment in someone other than the Secretary of Defense, the Court need not decide whether the Secretaries of the Military Departments (5 U.S.C. §102) are "heads of Departments" under the Appointments Clause, or whether only the Secretary of Defense, who represents the military in the Cabinet and whose department is listed as an Executive Department in 5 U.S.C. §101, meets that requirement. *See Freytag*, 111 S.Ct. at 2642-43 and 2658-61.

a civilian and hence is not politically accountable. Since the Navy's Judge Advocate General is a Rear Admiral, there are at least 50 admirals and Marine generals who outrank him. As a career military person, specializing in military legal matters, he lacks the breadth of perspective and political accountability found in department heads or the independence found in the courts of law. Moreover, as the head of the military justice system within his service, he will appoint those whom he believes will best carry out the goals of the military, with the inevitably greater emphasis on the needs of the Armed Forces than on the rights of the accused. In short, on the Appointments Clause issue, the fact that the appointment is made by the Judge Advocate General, rather than by the Secretary of Defense, is no mere technical violation, but is fundamentally at odds with the principle of political accountability and the "Framers' conclusion that widely distributed appointment power subverts democratic government." *Freytag*, *supra*, 111 S.Ct. at 2642.[11]

On the due process claim, the fact that it is the Judge Advocate General who can remove judges, either by transferring them to other non-judicial positions, or by decertifying them entirely as military judges, causes even greater difficulties. To be sure, the absence of a fixed term would still be a problem even if the person with the power to remove were the President (who is the only one who can remove a Judge Advocate General), the Secretary of Defense, the Secretary of the Navy, or the Chief of Naval Operations. But if the removal power were limited to one of those officials, that would substantially reduce the likelihood of such an occurrence and the resulting loss of independence, if

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[11] A predictable consequence of having appointments made by a mid-level official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is a striking lack of diversity among the judges of the Courts of Military Review. Thus, none of the 31 current appellate judges is a woman, and two of the four courts have no minority judges.

for no other reason than that their manifold other duties and their broader perspectives on the military would mean that only the most egregious cases would ever reach their desk, let alone result in an order of removal. More importantly, because the Judge Advocate General is responsible for the military justice system as a whole, and also wields the power of removal, the due process objection is greatly magnified.

The heart of the problem is found in a proposition that the military has long urged and that this Court has reiterated on a number of occasions, most recently and most clearly in *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986):

> to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps . . . The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff v. Willoughby* [345 U.S. 83, 92 (1953)].

No one disputes that the military justice system may operate differently from the civilian system to take into account the special needs of the military. An inevitable part of this system, which flows from the very nature of the military hierarchy, is the concern over possible command and other outside influences in courts-martial. Congress has specifically addressed this issue in several places in the UCMJ, both with respect to specific prohibitions on outside influence, Article 37(a), and in the concern that those who participate in the process either as defense counsel or members of a court-martial, Article 37(b), or as trial judges, Article 26(c) -- but not as prosecutors -- may have their fitness reports adversely affected by either their zealous representation of the accused or their rulings on the accused's behalf. *See also* Rule for Courts-Martial 104(b) (same).

Just recently, the *en banc* Navy-Marine Corps Court of Military Review agonizingly reached the conclusion that, despite the fact that the Judge Advocate General writes the fitness reports for the judges of that court, it was not a

violation of the due process rights of the accused to have those judges review his conviction. *United States v. Mitchell*, ___ M.J. ____ (NMCM 92-1933, May 24, 1993) (L). The special problem for judicial independence raised by the possibility of adverse fitness reports written by the Judge Advocate General is not before the Court, but the more general concern in *Mitchell* -- the potential for retaliatory action by the Judge Advocate General against military judges who take the defendant's side too often -- is present because of the power of the Judge Advocate General to transfer or remove any military judge at any time.

It is true that the Judge Advocate General is administratively responsible for both prosecutors and defense counsel, but no one has ever charged the Judge Advocate General with undue protection of the rights of the accused. Indeed, the special relation between the prosecutors and the Judge Advocate General can be seen from Article 67(a) of the UCMJ, 10 U.S.C. § 867(a), which provides for review of certain cases in the Court of Military Appeals. Under those provisions, an accused who wishes such review must do so by petition, based on good cause shown, whereas the Judge Advocate General can simply send the case from the Court of Military Review, and the Court must accept it. And when the Judge Advocate General forwards such a case, he "shall cause a copy of the decison of the Court of Military Review and the *order* forwarding the case to be served on the accused and on appellate defense counsel," but not on government appellate counsel. Rule for Courts-Martial 1203(c)(1) (emphasis added).

Even under *Medina*, the absence of a fixed term of office must meet the test of "fundamental fairness in operation." 112 S.Ct. at 2578. In a somewhat different context, the issue of impartiality and independence was examined in *Tumey v. Ohio*, 273 U.S. 510, 533 (1927), where Chief Justice Taft asked "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence[?]" And in *Withrow v. Larkin*, 421 U.S. 35, 47

(1975), the Court posed the issue as whether "under a realistic appraisal of psychological tendencies and human weakness, [the challenged practice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Or, as this Court expressed it in *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Whatever might be said for the proposition that military necessity of some kind justifies the lack of terms of office for appellate and trial judges in the Armed Services, that would not permit the decision on removal to be made by the Judge Advocate General as opposed to a higher, less interested, and more politically accountable official. Stated another way, if anyone should be allowed to transfer military judges before assigned terms of office have expired, it should be someone other than the Judge Advocate General. It is this combination of his principal role with his appointment and removal power over military judges that is so fundamentally unfair and that provides a further basis for finding a violation of the Due Process Clause of the Fifth Amendment.

Throughout this brief, petitioners have made their Appointments Clause and Due Process arguments separately. While many of the same facts are relevant to both, the legal arguments and most of the authorities are different. But in answering the ultimate question of whether courts-martial are being conducted by persons who were properly appointed and appropriately independent, the Court should not overlook that the two separate arguments are overlapping since they are both founded on the concern that the structural protections in our Constitution, which were intended to guarantee our freedoms, were not observed here. Either argument would be sufficient, but together they greatly magnify the defects in the military justice system and compound the violation of petitioners' constitutional rights.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed, and the cases remanded for further proceedings.

Respectfully submitted,

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JULY 8, 1993

ADDENDUM A

Relevant portions of the Uniform Code of Military Justice

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed service of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are-

(1) general courts-martial, consisting of-

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed

only of a military judge and the military judge approves;

(2) special courts-martial, consisting of-

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall

prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving,or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the

purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or

amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determine whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

United States Navy—Marine Corps
Court of Military Review

The Judge Advocate General

To all who shall see these presents

Greetings:

Know ye that reposing special trust in the Wisdom, Uprightness and Learning of

and by virtue of the power vested in me by an Act of the United States Congress, I do appoint him

Appellate Military Judge
United States Navy — Marine Corps Court of Military Review

and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution of the United States and the Uniform Code of Military Justice, and to have and to hold the said office, with all the powers, privileges and emoluments to the same appertaining to him.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C., this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General

United States Navy-Marine Corps
Trial Judiciary

The Judge Advocate General

To all who shall see these presents
Greetings:

Know ye that by virtue of the power vested in me by an Act of the United States Congress, and reposing special trust in the Wisdom, Integrity, Knowledge and Learning of

I have certified and designated the aforesaid officer

General Court-Martial Military Judge

Who is authorized and empowered to execute and fulfill the duties of that office according to the Constitution and applicable regulations, laws and statutes of the United States, and to hold the said office, with all the powers, privileges and emoluments appertaining thereto.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C. this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General

ADDENDUM C

Advisory Opinion of Judicial Conference
Committee on Codes of Conduct

June 22, 1992

To the Committee on Codes of Conduct of the Judicial Conference of the United States

Dear Judge and Committee Member:

I request an advisory opinion on a conflict of interest question that could appear before the Court on which I sit. This advice will help me devise legislation to resolve the perceived conflict. Some background information. I am the Chief Judge of the only Article I Federal appeals court. Our Judges serve a 15 year term and can be reappointed by the President with the Advice and Consent of the Senate. As you know, our jurisdiction covers criminal appeals from Federal convictions by court martial in the Armed Services. There are usually only two parties in every appeal, the appellant (servicemember) and the Government (the Department of Defense). Some of the cases we review involve the most serious Federal crimes including murder, rape, and espionage. I am told we now have nine capital murder cases in the military justice system. In each of the past two years we have handled a death penalty case. Congress has given the Chief Justice the power to designate Article III judges to sit on our Court in the event of a recusal of one of our Judges. This recusal procedure has been easily utilized several times in the last two years and with great success. Judges Sentelle, Wilkins, and Sporkin have sat with our Court using this procedure.

A serious conflict of interest in the judicial reappointment system of our Court was exposed in 1990 by the Federal Court Study Committee. The American Bar Association and other public entities have also recognized

and are concerned with this conflict of interest. In order to reduce that conflict of interest to practical application, I seek an advisory opinion of the Committee on Codes of Conduct for the following question:

> A United States Court of Military Appeals Judge (56 years old) is in the 14th year of her 15 year term appointment. The Judge is eligible and qualified for reappointment and has decided to seek reappointment. It is a matter of public knowledge that the Judge has requested the Department of Defense to reappoint her pursuant to [10 USC § 942]. The Department of Defense has the responsibility for recommending to the President individuals to be appointed to any vacancies on the U.S. Court of Military Appeals.
>
> If the Judge is reappointed, her salary would remain at the present $137,300 level. If the Judge is not reappointed, she would receive no salary and $109,800 as an annuity. The Judge learns that one of the next month's oral argument cases is an important, high visibility case for the Department of Defense. If the Government loses, the outcome of the case may seriously undercut the Department of Defense's policy banning homosexuals serving in the military. The Judge is concerned that her pending reappointment request will be perceived as a personal bias toward the Department of Defense. Should this Judge recuse herself from sitting on this case? . . .
>
> EUGENE R. SULLIVAN

COMMITTEE ON CODES OF CONDUCT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Re: Docket No. 891 July 6, 1992

Dear Chief Judge Sullivan:

You ask our advice as to whether a judge of your court should recuse him or herself in a case involving the Department of Defense where the judge's 15-year term on the court is about to expire and the judge has made known a desire to be reappointed. You advise that, as a matter of consistent practice, reappointments to your court are made by the President only upon recommendation of the Department of Defense and that while a retired judge of your court is entitled to a pension, that pension is substantially less in amount than the salary a judge would receive as a result of a reappointment to your court. You further indicate that the judges of your court have (1) adopted the Code of Conduct for United States Judges as a source of standards of conduct for judges of your court and (2) requested our Committee to give advice regarding the application of that Code upon the request of any member of your court.

Canon 3C(1) of the Code provides that a judge should recuse in any case in which the judge's impartiality might reasonably be questioned. We believe that a litigant opposing the Department of Defense in a case before your court might reasonably question the impartiality of a judge to sit on his case when the judge is seeking the approval of the Department of Defense for the judge's reappointment. Accordingly, we would advise that Canon 3C(1) requires recusal in the situation you describe.

WALTER K. STAPLETON

No. 92-1482

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF THE NATIONAL CAPITAL AREA, AND VIETNAM VETERANS OF AMERICA, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of the National Capital Area is one of its local affiliates. In support of its principles, the ACLU and its affiliates have appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has long argued that military justice must conform to the requirements of due process, and that due process demands an independent judiciary.

The Vietnam Veterans of America (VVA) is a non-profit national veterans service organization chartered by Congress. Its membership is composed of over 40,000 veterans of the Vietnam era in more than 500 chapters. Vietnam-era veterans and some of VVA's members are on active duty in the armed forces. Delegates to VVA's 1985 national convention passed a resolution instructing its Legal Services Program to intervene in appropriate cases where civil liberties issues affecting active duty personnel are at issue.

STATEMENT OF THE CASE

Petitioners contend that the military justice system is constitutionally defective in that its trial and intermediate appellate judges ("Military Judges") are not protected from removal if their decisions are disliked by the Judge Advocate General. *Amici* support that position.

In this brief, *amici* address the question of whether due process requires that, in peacetime, military trial and appellate judges be appointed to their judicial offices for

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

fixed terms. *Amici* do not address the issue that arises under the appointments clause.

Courts-martial exercise jurisdiction over the entire range of common law crimes.[2] Courts-martial also exercise jurisdiction over offenses unique to the military. *See* 10 U.S.C. §§877-934 (1988). And, regardless of whether an alleged offense is "service connected," the jurisdiction of Courts-martial extends to all offenses charged against military personnel. *Solorio v. United States*, 483 U.S. 435 (1987). Upon conviction, Courts-martial may impose sentences of death or life imprisonment, 10 U.S.C. §§906a, 918, or confinement at hard labor for a term of years.[3] MANUAL FOR COURTS-MARTIAL, United States (1984), Rule For Courts-Martial 1003(b)(8).

However, unlike the judges of every state and federal court of felony jurisdiction, Military Judges are not protected against summary dismissal from their judicial duties by either tenure for a fixed term of years or tenure during good behavior. Rather, once appointed, Military Judges may be reassigned to nonjudicial duties at any time by the Judge Advocate General of their service, who has responsibility for supervising all matters concerning military justice. *See* 1 Francis A. Gilligan & Frederic I. Lederer, COURTS-MARTIAL PROCEDURE §14-031.00, at 518-19 (1991). Neither statute nor regulation protects these judges from reassignment based on dissatisfaction with their findings of fact, conclusions of law, or sentencing practices. *Id.* §14-80.00, at 555.

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[2] These include traditional common law crimes such as murder, manslaughter, rape, larceny, robbery, forgery, maiming, sodomy, arson, extortion, assault, burglary, and housebreaking. *See* 10 U.S.C. §§918-930 (1988).

[3] Six service members currently are on death row. *See United States v. Simoy*, *appeal docketed*, No. 30496 (A.C.M.R. Apr. 21, 1993); *United States v. Curtis*, 33 M.J. 101 (C.M.A 1991), *cert. denied*, 112 S.Ct. 406 (1991); *United States v. Loving*, 34 M.J. 956 (A.C.M.R.)(affirming death sentence); *petition for reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992); *United States v. Gray*, No. 8800807 (A.C.M.R. Dec. 15, 1992)(affirming death sentence); *United States v. Thomas*, 33 M.J. 644 (N.M.C.M.R. 1991); *United States v. Murphy*, 36 M.J. 1137 (A.C.M.R. 1993)(affirming death sentence).

In contrast, the judges of every state court of analogous jurisdiction are protected by either fixed terms of office or life tenure. *See* THE AMERICAN BENCH: JUDGES OF THE NATION (Marie T. Hough 6th ed. 1991-92). Every U.S. district and appellate court judge is protected by life tenure, and all comparable Article I judges enjoy fixed terms of office. In short, military courts are the only courts in the United States with felony jurisdiction whose judges are subject to summary removal.

The tenuous hold on their offices leaves Military Judges susceptible to the temptation of satisfying interests other than justice and prevents them from exercising their judicial function in the same neutral and detached environment as their colleagues do in every comparable state and federal court.

Petitioners were convicted and sentenced before military judges who served for no secure term of office.

Petitioner Weiss pleaded guilty in a bench trial to larceny of a $9.00 racquetball glove in violation of Uniform Code of Military Justice Art. 121, 10 U.S.C. §921 (1988). The Honorable E. F. Pesik, who presided over the special court-martial, sentenced Weiss to three months of confinement, forfeiture of $1395 in pay, and separation from the service with a bad conduct discharge. The Navy-Marine Corps Court of Military Review affirmed, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), as did the Court of Military Appeals, 36 M.J. 224 (C.M.A. 1992).

Petitioner Hernandez pleaded guilty in a bench trial to possession, importation, and distribution of cocaine, in violation of Uniform Code of Military Justice Art. 112a,

10 U.S.C. §912a (1988). The Honorable H. K. Jowers, then a colonel in the United States Marine Corps, presided over the general court-martial and sentenced Hernandez to 25 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and separation from the service with a dishonorable discharge. The Navy-Marine Corps Court of Military Review affirmed, *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1992), as did the Court of Military Appeals, No. 68237/MC (C.M.A. Feb. 25, 1993).

SUMMARY OF ARGUMENT

The Due Process Clause of the Fifth Amendment requires at the minimum that judges be neutral and independent in both reality and appearance. Any arrangement that positions a judge to advance personal interests through the outcome of proceedings, or that tempts a judge to make judicial decisions on bases other than the facts and the law, denies defendants in criminal proceedings due process of law.

For nearly 300 years our system of justice has embraced the principle that judges who serve at the pleasure of another government officer are not and cannot be sufficiently neutral and independent. The English legal system reached this conclusion by 1700, and its judges have been protected against summary removal from their judicial offices ever since. The American colonists declared their independence in part because, unlike English judges, colonial judges continued to serve at the pleasure of the Crown, and the majority of the newly independent states immediately granted their judges secure terms. Today, the judges of every state court of felony jurisdiction serve for at least a fixed term of years, if not for life, as do the judges of every federal court of comparable jurisdiction. The lone exception to this pattern are the judges of Courts-martial and the Courts of Military Review.

Military Judges remain an aberration in the American legal system absent a secure term of office. This unjustified arrangement is incompatible with traditional and fundamentally held notions of due process -- and particularly so in view of the truly awesome power of the military justice system to deprive an accused of life, liberty, and property. Therefore, whether the Court analyzes this arrangement under the historical analysis of *Medina v. California*, 505 U.S. __, 112 S.Ct. 2572 (1992), or the interest analysis of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), it should reverse the decisions of the Court of Military Appeals.

ARGUMENT

I. DUE PROCESS REQUIRES A FAIR PROCEEDING BEFORE A JUDGE FREE FROM BIAS, THE POSSIBILITY OF TEMPTATION, AND THE APPEARANCE OF INTEREST IN THE CASE

It is settled constitutional law that due process requires a "'neutral and detached judge in the first instance.'" *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, __ U.S. __, 61 U.S.L.W. 4611, 4615 (June 14, 1993)(quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *see also Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The Court has jealously guarded the requirement of neutrality, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and has held that direct or indirect judicial interest in the outcome of a case, whether pecuniary or other, fails to satisfy due process requirements.

The principles that govern the requirement of judicial impartiality today were first announced by this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927). There the Court held unconstitutional an arrangement in which a mayor, acting as judge, personally received court costs upon con-

viction of the defendant but not upon acquittal. The Court held that a defendant in a criminal case could not receive due process of law where the judge had such a "direct, personal, substantial, pecuniary interest" in the outcome of the case. *Id.* at 523. The Court explained that, even though some mayors would not succumb to the temptation of satisfying their own monetary interests before those of a defendant, the mere possibility was enough to invalidate the arrangement. *Id.* at 532.

Tumey's basic principle -- that due process is denied where a judge might be tempted to decide a case on the basis of factors other than the facts and the law -- is not limited to situations involving a direct relationship between a judge's income and the number of convictions. Indeed, "before one may be deprived of a protected interest, whether in a criminal or civil setting . . . one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . . ." *Concrete Pipe*, 61 U.S.L.W. at 4615 (citations and internal quotation marks omitted).[4]

By the same token, in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), the Court held that a state optometry board, whose members were all practicing optometrists, could not satisfy due process requirements in its delicensing proceedings because its members might benefit professionally from any consequent reduction in competition. In *Ward v. Village of Monroeville*, 409 U.S. at 58-60, the Court held that a mayor could not sit as judge of the Mayor's Court because assessments of fines, fees, and forfeitures contributed to village finances, which the

[4] Thus, a judge's interest in a proceeding requires disqualification if a particular outcome "substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 830 (1986)(Brennan, J., concurring).

mayor had an institutional interest in accumulating. And, in *In re Murchison*, 349 U.S. 133, 137-39 (1955), the Court held that a judge could not preside over contempt proceedings concerning events in grand jury proceedings over which he had also presided.

As *amici* explain below, the very same possibility of temptation and appearance of bias forbidden by *Tumey* and its progeny exists in arrangements by which judges serve at the pleasure of other government officers who may in turn have an interest in the prosecution. As the Court has recently admonished, "'justice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Concrete Pipe*, 61 U.S.L.W. at 4615 (quoting *Marshall v. Jerrico*, 446 U.S. at 242); *Murchison*, 349 U.S. at 136; *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Aetna*, 475 U.S. at 825.

II. A SECURE TERM OF OFFICE IS THE *SINE QUA NON* OF JUDICIAL NEUTRALITY AND INDEPENDENCE AS RECOGNIZED BY AMERICAN AND ENGLISH JURISPRUDENCE

It has been a fundamental principle of Anglo-American jurisprudence for nearly 300 years that judges who serve at the pleasure of another government officer cannot perform their judicial function in a truly neutral and detached manner, and cannot, therefore, afford defendants a fair trial. The English legal system embraced this principle by Act of Parliament in 1700. American colonists declared their independence partly because colonial judges were not protected. The Framers incorporated this principle into the Constitution, and now all federal and state courts of felony jurisdiction have followed suit, with the exception of Courts-martial and the Courts of Military Review.

A. The English Lesson

English judges have been free from the threat of arbitrary or retaliatory dismissal since the early eighteenth century. In 1700, Parliament passed the Act of Settlement, which provided that judges should hold their offices *quamdiu se bene gesserit*; that is, "so long as [they] should behave well." J. H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 145 (2d ed. 1979); *see also* 1 William Holdsworth, A HISTORY OF ENGLISH LAW 195 (7th ed. 1956). Although the Act of Settlement did not alter the fact that the judges' tenure would cease upon the death of the Sovereign, that problem was remedied by statute in 1760, and since then English judges who serve on courts of felony jurisdiction, like federal judges in the United States, effectively hold their offices during good behavior. Baker at 146; 1 Holdsworth at 195.

The protection afforded English judges was the culmination of several centuries of English legal history replete with instances of interference with the courts and of politically motivated summary dismissals of judges by both the Crown and the Parliament. Prior to 1700, all but a few judges served at pleasure, and neither the Crown nor Parliament showed restraint in exercising their prerogative for political reasons. In 1386, at the direction of Parliament, Richard II's chief judge was executed and other judges arrested and banished from the kingdom for ruling that Parliament's annulment of the king's power to govern was contrary to law. 2 Holdsworth at 560 (4th ed. 1927). In 1469, Chief Justice Markham lost his position on the King's Bench because he declined to convict an accused of treason. *Id.* at 562. One scholar notes that prior to the Act of Settlement "kings often expected subservience from their judges in matters affecting the Crown" and that during the sixteenth century "there were occasions when the judges seem to have conformed their opinions to the king's wishes." Baker at 144.

The worst abuses, however, and those that led directly to the Act of Settlement, were perpetrated in the seventeenth century, at a time when the Crown relied on the courts to resolve political and constitutional questions. Sir Edward Coke, dismissed from his position as Chief Justice in 1616 for his failure to state whether he would stay a suit if the king so ordered, heads the list of distinguished jurists removed from the bench because their loyalty to the Crown's policies had been called into doubt during the reigns of the four Stuart Kings. *See* 5 Holdsworth at 351-52 (4th ed. 1927); 6 Holdsworth at 213 (4th ed. 1927); Baker at 145.

A common form of interference by the Crown with the judiciary in this period involved seeking extra-judicial opinions. As Holdsworth notes, such consultation was legal at the time, "[b]ut when a king, who could and did dismiss judges for political reasons, constantly put these questions to them, they were obviously exposed to the constant temptation of giving the answer known to be wanted." 5 Holdsworth at 351. "[T]hey became . . . as sharp sighted as secretaries of state in the mysteries of state, and in courts of law apothegms of state were urged as elements of law." *Id.* at 352. Fully aware of the king's willingness to exercise his dismissal power, the judges were unable to fulfill their duties impartially and independently. The impact on individual liberties was catastrophic:

> Those who were arrested and imprisoned by the king or his Council could get no redress . . . [t]he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government. Privilege of Parliament was as straightly restricted by the judges as formerly it had been largely extended by the House of Commons. Punishments were proportioned rather to the

> wishes of the Crown than to the gravity of the offence. No redress could be got against the misdeeds of favorites of the king whom he chose to protect; and, a fortiori, no proceedings could be taken against servants of the Crown who had acted in obedience to the orders of the Crown.

6 Holdsworth at 214-15 (footnotes omitted). In short, "the best security which the subject had for the maintenance of his liberties was almost destroyed. The administration of the common law, upon which those liberties depended, was tainted at the source." *Id.* at 214.

But individual liberties were not the only casualties of the period, for the bench and bar suffered as well. Judges became political creatures, mere civil servants of the king, and not the "independent expositors" of the law they once had been. 5 Holdsworth at 352. Although some judges were at times able to act independently, in the eyes of the public they all inevitably became identified with the "party and policy" of the king. *Id.* "The result," writes Holdsworth, "was to bring both the judges and the law into contempt." *Id.* at 354.

In light of the English legal system's experience with judges who served at pleasure, it is not surprising that the Act of Settlement is viewed as a critical event in the development of the modern British Constitution. 10 Holdsworth at 644 (6th ed. Printing 1975). Blackstone reports that George III had been pleased to declare that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the Crown." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *268 (1765)(citing HOUSE OF COMMONS JOURNAL, March 3, 1761). Holdsworth comments that the monarch "was not only expressing the view universally held in the eighteenth century, but also

a political truth of universal application." 10 Holdsworth at 644.

B. The Colonial Experience and American Practice

While the Act of Settlement established the integrity of the English courts, none of its benefits was enjoyed by the colonies. Rather, colonial judges were appointed by the colonial governors and served at their pleasure. 11 Holdsworth at 61 (6th ed. 1938). In fact, the Crown specifically resisted attempts by local assemblies to extend the protection of tenure during good behavior to colonial judges. *Id.* at 62. The Crown's reasons can be found in pure power politics: colonial judges were dependent on local colonial assemblies for their salaries; if they were granted tenure during good behavior, the Crown would have had no effective control over its colonial judges. In short, the Crown feared an independent judicial system in the colonies. Thus, when the colonies declared independence from England, their grievances specifically included colonial judges who were subject to removal at the pleasure of the Crown: "[h]e has made judges dependent on his Will alone, for the tenure of their offices." DECLARATION OF INDEPENDENCE (July 4, 1776).

Illustratively, the Massachusetts Declaration of Rights of 1780, recognized as a summary of fundamental rights held by Americans at the end of the Revolution, states that,

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

MASSACHUSETTS DECLARATION OF RIGHTS Art. XXIX (1780),

reprinted in 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 344 (1971). Massachusetts, along with Virginia, Maryland, Delaware, New Hampshire, New York, North Carolina, and Pennsylvania all sought to ensure impartiality by providing judges with tenure during good behavior.[5] Martha A. Ziskind, "Judicial Tenure in the American Constitution: English and American Precedents," Sup.Ct.Rev. 135, 138-47 (1969). Other states, such as New Jersey and Georgia, decided that providing for a fixed term of years would guarantee sufficient judicial impartiality. *Id.*

The Framers recognized the importance of a secure term of office to judicial independence and impartiality, and they drafted the Constitution to provide that those who exercise the judicial power of the United States "shall hold their offices during good behavior." U.S. Const. Art. III, §1. As Hamilton explained in THE FEDERALIST NO. 78, "nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office." Andrew Hamilton, THE FEDERALIST NO. 78 (1788).

Today, the norm of a secure term of office for federal judges extends beyond the Article III judiciary. In fact, secure terms of office are the rule among Article I courts of felony jurisdiction, and even judges of Article I courts *without* felony jurisdiction, with few exceptions, serve for fixed terms of years.[6]

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[5] *See, e.g.*, NEW HAMPSHIRE BILL OF RIGHTS Art. XXXV (1783), *reprinted in* 1 Schwartz at 379 ("It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme (or superior) judicial court should hold their offices so long as they behave well . . . .").

[6] The judges of the Court of Military Appeals serve 15 year terms, 10 U.S.C. §942 (1988); bankruptcy judges are appointed for 14 years, 28 U.S.C. §152(a)(1)(1988); magistrate judges serve for 8 years, 28 (continued...)

Further, the judges of every state court of felony jurisdiction and every state court of appeals serve for a fixed term of years, for life during good behavior, or until a specific retirement age. *See* THE AMERICAN BENCH, JUDGES OF THE NATION, *supra* p.3 (reviewing the terms of offices of the judges of all state courts); National Center for State Courts, Conference of State Court Administrators, STATE COURT ORGANIZATION 271-302 (1987).

Courts that have considered whether judges must hold secure terms of office have recognized and applied the long-established principle that, without a secure term of office, no judge may be considered neutral and detached. In *Winter v. Coor*, 695 P.2d 1094 (Ariz. 1985), the Arizona Supreme Court considered the case of a town magistrate who served at the pleasure of the town council. In the course of holding that such an arrangement violated the Arizona Constitution's separation of powers, the court explained the importance of judicial independence to due process concerns:

> This situation is abhorrent to the concept of fundamental fairness and so inherently likely to deprive the court of real independence as

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[6] (...continued)
U.S.C. §631(e)(1988); tax court judges serve for 15 years, 28 U.S.C. §7443(e)(1988); judges of the District of Columbia serve for 15 years, District of Columbia Code §§11-1501 and 1502 (1981); and territorial judges are all now appointed for terms of 10 years, 48 U.S.C. §1424b (Guam), §1614 (Virgin Islands), and §1694 (Northern Mariana Islands)(1988). The commissioners of federal regulatory agencies, such as the National Labor Relations Board, 29 U.S.C. §153 (1988); the Securities and Exchange Commission, 15 U.S.C. §78d (1988); and the Federal Trade Commission, 15 U.S.C. §41 (1988), all have terms of office of 5 years or more. Administrative law judges serve for indefinite terms, subject to removal after hearing and only for cause, 5 U.S.C. §§3105 and 7521 (1988). Special trial judges of the Tax Court, 28 U.S.C. §7443A (1988), and administrative judges who perform functions similar to those of administrative law judges, but do so on matters of lesser significance, serve for no fixed terms.

> to deny litigants opposing the city the impartial tribunal required as an element of due process.
>
> * * *
>
> The implicit and omnipresent threat that a . . . judge can be removed immediately without cause hangs like the sword of Damocles above his bench as he rules on cases. The single hair by which it hangs is the "pleasure" of the city council whose attorney litigates before him.

Id. at 1099 (quoting *People of Thornton v. Horan*, 556 P.2d 1217, 1221)(Colo. 1976)(Carrigan, J., dissenting), *cert. denied*, 431 U.S. 966 (1977); *see also State ex rel. Morales v. City Comm'n of Helena*, 570 P.2d 887, 889 (Mont. 1977)("[t]he power to remove the police judge following a ruling adverse to the city commission is an impermissible infringement upon the duty of each and every judge to render a fair and impartial decision"); *State ex rel. Evans v. Superior Court*, 159 P. 84, 86 (Wash. 1916)(mayor's power to remove police judge at his pleasure "would violate the very principle upon which the judicial function is made to rest -- that of absolute freedom from fear or favor of the appointing power. It would not be so if a judicial officer were to be made the subject of the whim or caprice of the appointing power").

Indeed, we can find no state court decision holding that judges who preside over courts of felony jurisdiction, like Military Judges, may serve at the pleasure of another government official.[7] Decisional law indicates that

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[7] Importantly, the few decisions that have allowed judges to serve at pleasure all involved municipal courts of *severely* limited jurisdiction which bear no resemblance to courts-martial or the Courts of Military Review. *See Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988)(city courts with jurisdiction over traffic violations or violations of city ordi-

(continued...)

courts would be justly loathe to find that judges who preside over courts with jurisdiction as extensive as that of military courts can exercise their functions impartially and independently.

Together, federal practice, state practice and decisional law explain that the hard-learned lessons of the English legal system are firmly ingrained in American jurisprudence. By definition, judges who serve at the pleasure of other government officials cannot fulfill their duties in the neutral and detached manner that affords litigants the fair tribunal, free from any "possible temptation," *Tumey*, 273 U.S. at 532, or appearance of bias, that due process of law requires.

III. PETITIONERS' DUE PROCESS CLAIM SUCCEEDS UNDER EITHER THE *MEDINA* OR THE *MATHEWS* ANALYSIS

Amici urge that petitioners' due process claim succeeds whether the Court analyzes this question under *Medina v. California*, 112 S.Ct. 2572, or under *Mathews v. Eldridge*, 424 U.S. 319.

Under *Medina*, the Court would consider whether a criminal justice system in which the trial and intermediate appellate judges serve at the pleasure of another

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[7] (...continued)
nances, and no authority to impose fines exceeding $50 or to impose extensive terms of imprisonment); *Buckalew v. Holloway*, 604 P.2d 240 (Alaska 1979)(no jurisdiction to try criminal cases); *People v. Horan*, 556 P.2d 1217 (municipal court with limited jurisdiction and trial *de novo* on appeal to court with judge serving for fixed term). The narrow jurisdiction of the tribunals at issue in these cases strongly suggests that the *Summers*, *Buckalew*, and *Horan* courts would view similar terms of office in courts of felony jurisdiction as intolerably impairing the impartiality and independence of judges. *See Summers*, 764 S.W.2d at 184 ("the holding of this case is expressly limited to those city courts that are not vested with concurrent jurisdiction with a General Sessions Court").

government officer "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 112 S.Ct. at 2573 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). Petitioners should succeed under *Medina* because, as *amici* have demonstrated above, it is a settled principle of Anglo-American jurisprudence that one critical and irreducible component of a fair trial is a neutral and detached arbiter, and that judges who serve at the pleasure of another government officer cannot perform their judicial function in a truly neutral and detached manner.

Any argument that the relevant historical inquiry under *Medina* is limited to the military justice system fails to acknowledge the full scope of the *Medina* analysis. *Medina* directs inquiry not to the custom of the jurisdiction whose practice has been drawn into question, but to the traditions and conscience of "*our people*." 112 S.Ct. at 2573 (emphasis added). Accordingly, the Court's own due process analyses under *Medina* have focused on the practices of England and the colonies, and on the historical and contemporary practices of the states and the federal government. *See, e.g., Herrera v. Collins*, 506 U.S. __, 113 S.Ct. 853, 864-68 (1993); *Parke v. Raley*, 506 U.S. __, 113 S.Ct. 517 (1992). Indeed, a narrow inquiry into the customary practice of the military justice system would offer little insight into the principles of justice that the American people hold as fundamental.

Under the *Mathews* analysis, the Court would consider the interests of the defendants that are at stake in such a system, the risk of an erroneous deprivation of these interests and the probable value of additional procedural safeguards, and the interests of the government. 424 U.S. at 335. Because an accused can hardly have greater interests than those at stake in the military justice system, and because the government has not articulated any interest that warrants the current arrangement,

petitioners have satisfied the first and third of the *Mathews* inquiries. *See* Petitioners' Brief §IIA.

As to the remaining inquiry under *Mathews*, our system of justice has concluded that schemes by which judges serve at the pleasure of another government officer inherently run the risk of erroneous deprivations of life, liberty, or property, as *amici* have shown above. Importantly, the error to which such judges are prone is not merely one of mistake. Rather, the potential error is that such judges will find facts and rule on points of law with an eye towards the predilections of those at whose pleasure they serve. *See Winter v. Coor*, 695 P.2d at 1099. The current arrangement, by which Military Judges serve at the pleasure of their respective Judge Advocates General, runs this same risk of depriving military personnel of their lives, liberty, or property based on factors other than the merits of their cases.

The personal integrity of the Military Judges involved in this case is not at issue here. At issue is a system whereby even judges of the highest integrity know that their tenuous hold on their judicial positions, and thus the stability of their personal and professional lives, may ultimately depend on the Judge Advocate's pleasure with the results of their work. This personal interest is no less substantial than the interests this Court found disqualifying in *Gibson* and *Ward*. The connection between the performance of Military Judges and their own personal and professional well being is strong, palpable, and real. It is this type of "possible temptation" that this Court has found unacceptable, *see, e.g., Tumey*, 273 U.S. at 532, that creates an appearance of bias which taints the military justice system, and that runs the risk of erroneous deprivations. *See Winter v. Coor*, 695 P.2d at 1098-99; *State ex rel. Morales*, 570 P.2d at 889; *State ex rel. Evans*, 159 P. at 86. Petitioners therefore satisfy the second *Mathews* inquiry, and they should succeed under *Mathews* as well as *Medina*.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the decisions of the Court of Military Appeals.

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No. 92-1482

In the Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS AND ERNESTO HERNANDEZ,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have a fixed term of office.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Military Appeals in the case of petitioner Weiss, Pet. App. 1a-85a, is reported at 36 M.J. 224. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 86a-87a, is unreported. The order of the Court of Military Appeals in the case of petitioner Hernandez, Pet. App. 88a, is not yet reported. The opinion of the Navy-Marine Corps Court of Military Review in that case, Pet. App. 89a-91a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Weiss* was entered on December

21, 1992. The judgment of the Court of Military Appeals in *United States* v. *Hernandez* was entered on February 25, 1993. The petition for a writ of certiorari in both cases was filed as a joint petition on March 12, 1993, and was granted on May 24, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1259(3) (Supp. III 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, provides as follows:

> [The President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The Due Process Clause of the Fifth Amendment provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

STATEMENT

1. The military criminal justice system conducts three types of criminal proceedings, known as courts-martial. The summary court-martial, which is designed to adjudicate only minor offenses, is limited to enlisted servicemembers and can be conducted only with their consent. A single commissioned officer

presides over a summary court-martial, and he can impose up to one month's confinement and related punishments. Arts. 16(3), 20, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816(3), 820; see also *Middendorf* v. *Henry*, 425 U.S. 25 (1976).

At the next level is the special court-martial. It normally consists of a military judge and at least three members, although the accused may elect to be tried by a military judge alone. Art. 16(2), UCMJ, 10 U.S.C. 816(2).[1] A special court-martial has jurisdiction over most offenses under the UCMJ, but the maximum punishment that it can impose is limited by statute to confinement for six months, a bad conduct discharge, forfeiture of two-thirds pay per month for six months, and a reduction in rank. Art. 19, UCMJ, 10 U.S.C. 819.

A general court-martial is composed of either a military judge and not less than five members, or a military judge alone if the defendant so requests. Art. 16(1), UCMJ, 10 U.S.C. 816(1). A general court-martial may try all offenses defined by the UCMJ and may impose any punishment authorized by the Code. Art. 18, UCMJ, 10 U.S.C. 818.

The military judge at a special or general court-martial acts as the presiding officer. He conducts pretrial sessions at which a defendant is arraigned and pleas are entered; he rules on all legal questions; and he instructs the members on the laws and procedures to be followed in the case. Rule for Courts-Martial 801(a), *Manual for Courts-Martial*,

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[1] Although Article 16(2) allows court-martial members to sit without a military judge at a special court-martial, in practice military judges are almost always detailed to such cases.

United States—1984 (*Manual*). When a military judge presides over a court-martial composed of panel members, the members decide guilt or innocence and, when necessary, impose sentence. Rules for Courts-Martial 921, 1006. When a military judge sits alone, he decides those issues. Art. 16, UCMJ, 10 U.S.C. 816. The sentence imposed by any type of court-martial does not become final until it is approved by the officer who convened the court-martial. Art. 60, UCMJ, 10 U.S.C. 860.[2]

All cases in which the sentence approved by the convening authority extends to death, confinement in excess of one year, dismissal of a commissioned officer, or a punitive discharge in the case of enlisted servicemembers, are forwarded to the courts of military review. Art. 66, UCMJ, 10 U.S.C. 866. The members of those courts are assigned to that duty by the Judge Advocate General of each service.[3]

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[2] The convening authority is a commander authorized to convene courts-martial under Articles 22-24, UCMJ, 10 U.S.C. 822-824, and Rule for Courts-Martial 504. The duties of the convening authority include selection and appointment of court-martial panel members (commonly known as "detailing" the members); determination and direction that the accused be brought to trial by the court-martial for the charged offenses (commonly known as "referral" of the charges); and post-trial review of the proceedings to approve the sentence or to grant clemency (commonly known as "action" on the case). See Arts. 25, 34, 60, UCMJ, 10 U.S.C. 825, 834, 860; see also Rules for Courts-Martial 503, 601, 1107.

[3] The Judge Advocate General of each service is the principal legal officer for that service. 10 U.S.C. 3037 (Army), 5148 (Navy-Marine Corps), 8037 (Air Force). The General Counsel of the Department of Transportation serves as the Judge Advocate General for the Coast Guard. Art. 1(1), UCMJ, 10 U.S.C. 801(1). Military attorneys serving under the authority of the Judge Advocate General of each service are referred to as judge advocates.

The courts of military review exercise fact-finding powers and may disapprove court-martial findings and sentences. *Ibid.* After review by the court of military review, a court-martial case is subject to review by the Court of Military Appeals, a five-member civilian court whose judges are appointed by the President to statutorily fixed terms of office. Arts. 67, 142, UCMJ, 10 U.S.C. 867, 942 (Supp. IV 1992).

2. Petitioner Weiss, a member of the United States Marine Corps, pleaded guilty at a special court-martial to one count of larceny, in violation of Article 121, UCMJ, 10 U.S.C. 921. He was sentenced to three months' confinement, to partial forfeiture of pay for three months, and to a bad-conduct discharge. Petitioner Hernandez, also a member of the Marine Corps, pleaded guilty to smuggling 11 kilograms of cocaine into this country from Colombia aboard military aircraft, in violation of Article 112a, UCMJ, 10 U.S.C. 912a, and conspiracy, in violation of Article 81, UCMJ, 10 U.S.C. 881. He was sentenced to 25 years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved Hernandez's sentence as adjudged, but suspended all confinement in excess of 20 years in accordance with a pretrial agreement.

The Navy-Marine Corps Court of Military Review affirmed petitioners' convictions. Pet. App. 86a-87a, 89a-91a. In the case of petitioner Weiss, the Court of Military Appeals granted plenary review to address his claims and affirmed. Pet. App. 1a-85a.

Relying on its decision in *United States* v. *Graf*, 35 M.J. 450 (C.M.A. 1992), petition for cert. pending, No. 92-1102, the court, without dissent, held that due process does not require military judges to have a fixed term of office. Pet. App. 2a n.1. The court also rejected petitioners' Appointments Clause challenges to the judges on the trial courts and the court of military review. *Id.* at 3a-35a. Judges Gierke and Cox concluded that the duties of a judge in the military justice system are germane to the duties that military officers already discharge and that the assignment of an officer to judicial duties therefore does not require a new appointment. *Id.* at 8a-19a. Judge Crawford concurred in the result on the ground that the Appointments Clause does not apply to the military. *Id.* at 22a-35a. Chief Judge Sullivan and Judge Wiss dissented separately. *Id.* at 36a-71a, 72a-85a.

In the case of petitioner Hernandez, the Court of Military Appeals summarily affirmed on the basis of its decision in *United States* v. *Weiss*. Pet. App. 88a.

SUMMARY OF ARGUMENT

I. The Appointments Clause does not bar Congress from authorizing the Judge Advocates General to assign commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review. Since military judges are officers of the United States appointed by the President with the advice and consent of the Senate, an additional appointment to act as a military judge is unnecessary if the duties they undertake in that role are "germane" to ones they already possess. *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893). The germaneness test is easily satisfied here, because all

military officers play integral roles in the administration of the military justice system, which is indispensable to maintaining good order and discipline within the services. Service as a military judge is an important and specialized form of participation in the military justice system, but it is not so foreign to the other functions performed by commissioned military officers in the military justice system that the Constitution requires a separate appointment under the procedures set out in the Appointments Clause.

If the Judge Advocates General cannot appoint military judges, prior appointments nonetheless should be given effect under the "de facto officer" doctrine. The judges in petitioners' cases were not usurpers, without authority or function; they exercised the power vested in them by statute and by their facially valid assignments. And an adverse decision on this issue would have a devastating effect on the operation of the military justice system, affecting all pending prosecutions and all cases on direct appeal in which the issue has been preserved. Accordingly, if the Court concludes that the present method of appointing military judges is unconstitutional, it should nonetheless give validity to those judges' prior acts and uphold the convictions in these cases under the de facto officer doctrine.

II. Due process does not require that military judges have life tenure or a fixed term of office. The relevant inquiry is whether the absence of tenure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1992), and not whether a court

considers tenure a useful reform that would not impose an undue burden on the military.

Under the governing standard, the military system does not deny defendants due process of law. The text of the Constitution grants tenure to specified officers, including federal judges, but it does not grant tenure to military judges or members of other Article I courts. History also does not suggest that tenure is an indispensable aspect of a fair court-martial system. Court-martial judges did not have tenure in England at common law and have never enjoyed tenure in the American military justice system. Moreover, tenure serves no end in itself, but renders a judicial system fairer only if it serves to remedy risks of bias that otherwise would affect the system. The military justice system has been designed to address the risk of judicial bias in other ways, such as ensuring that both the selection and the performance review of judges is done by persons other than those responsible for pressing criminal charges and initiating prosecutions. The Uniform Code of Military Justice and the services' regulations are carefully structured to ensure that military judges are independent and impartial. In light of those guarantees, the absence of tenure does not render the military justice system fundamentally unfair and thus does not violate due process.

ARGUMENT

I. CONGRESS CAN AUTHORIZE THE JUDGE ADVOCATE GENERAL OF EACH SERVICE TO ASSIGN COMMISSIONED OFFICERS TO SERVE AS MILITARY JUDGES

The Appointments Clause, Art. II, § 2, Cl. 2, divides the "Officers of the United States" into two categories. "Principal officers" must be appointed by the President with the advice and consent of the Senate. "Inferior officers" can be appointed in that manner as well, but Congress can vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Morrison* v. *Olson*, 487 U.S. 654, 670 (1988); *Buckley* v. *Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause promotes the separation of powers by preventing one Branch from aggrandizing power at the expense of another and by preventing diffusion of the appointment power. *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2638 (1991); *id.* at 2651-2653 (opinion of Scalia, J.); *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 485-488 (1989) (Kennedy, J., concurring in the judgment).

Petitioners were convicted and sentenced by military officers who had been assigned to serve as military judges. Petitioners' convictions and sentences were sustained by the Navy-Marine Corps Court of Military Review, which also consists of military officers. Each of those judges had been appointed as an officer in the armed forces by the President with the advice and consent of the Senate. They were then assigned to serve as judges in the military justice system by the Navy Judge Advocate General.

Petitioners maintain that the judges in their cases—and in every other case prosecuted in the

military since the UCMJ was amended in 1968—were not authorized to perform the responsibilities of those offices, because they were not appointed as military judges in the manner provided for in the Appointments Clause. Since the Judge Advocates General are neither Courts of Law nor Heads of Departments, petitioners argue that they cannot appoint military judges, even if military judges are regarded as "inferior officers." That argument is mistaken. Assignment of a military officer to serve as a trial or appellate judge is entirely consistent with the Appointments Clause, because those judicial duties are germane to the duties of a military officer.[4]

[4] We agree with petitioners, Br. 14, that military officers must be appointed as officers pursuant to the Appointments Clause; we therefore disagree with Judge Crawford's contrary view, see Pet. App. 22a-35a. As this Court has explained, "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Art. II]." *Buckley*, 424 U.S. at 126; *Freytag*, 111 S. Ct. at 2640. That is the case regardless of the power Congress exercises in creating the positions to be filled. *Buckley*, 424 U.S. at 132-137. We also agree with petitioners, Br. 14, that military officers have responsibilities of sufficient importance that they must be considered "Officers of the United States," not merely "employees." See *Wood* v. *United States*, 107 U.S. 414, 417 (1883) (assuming that the Appointments Clause applies to military officers); *Freytag*, 111 S. Ct. at 2640.

We do not agree with petitioners that military judges are "principal officers" of the United States. Like the independent counsel found to be an "inferior officer" in *Morrison*, military judges are subject to removal by a higher Executive Branch official: the Judge Advocate General of each service, Arts. 1(1), 26, 66, UCMJ, 10 U.S.C. 801(1), 826, 866, or the President, acting in his capacity as commander-in-chief. See *Morrison*, 487 U.S. at 671. Moreover, the authority of a military judge does not extend to formulating policy for the Executive Branch or even the military. See *Morrison*, 487 U.S. at 671-672. The characterization of military judges as inferior officers is consistent with the Court's prior decisions on the issue. See *Freytag*, 111 S. Ct. at 2640-2641; *United States* v. *Nixon*, 418 U.S. 683, 696 (1974); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-354 (1931); *United States* v. *Eaton*, 169 U.S. 331, 343-344 (1898); *Ex parte Siebold*, 100 U.S. 371, 379-380, 397-398 (1880). In any event, however, because the persons who served as military judges in this case were all appointed as military officers by the President and confirmed by the Senate, it does not matter to the disposition of this case whether they are considered principal officers or inferior officers.

A. A Military Officer Does Not Need A New Appointment To Serve As A Military Judge Since His Judicial Duties Are Germane To Those He Already Enjoys As A Military Officer

1. *An officer can perform new duties germane to his existing ones without being reappointed to office*

Military officers are officers of the United States appointed by the President with the advice and consent of the Senate. Their appointments as officers are made in accordance with the Appointments Clause, so that unless their assignment as military judges constitutes a new "appointment," for purposes of the Appointments Clause, they need not separately be appointed to those duties under the procedures specified in that Clause. Rather, they may perform their newly assigned duties as long as those duties are germane to the responsibilities they already enjoy in their roles as military officers.

This Court recognized the doctrine of "germaneness" in *Shoemaker* v. *United States*, 147 U.S. 282

(1893). There, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park in the District of Columbia. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers, the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia, also were designated by Congress to serve on the commission. 147 U.S. at 284. Their designation was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that

> the two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held * * * [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Id. at 301. After considering the new responsibilities given to the officers, the Court concluded that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer (In re Certain Complaints Under Investigation)*, 783 F.2d 1488, 1515 (11th Cir.), cert. denied, 477 U.S. 904 (1986).

That rule is a sensible one. It enhances the efficient operation of the Executive Branch by enabling existing officers to perform related duties without having to undergo the cumbersome process of reappointment and face the prospect of interbranch friction every time the officers' duties are modified. And it does not undercut the authority of the Legislative Branch, which can define Executive Branch offices in a way that makes clear when reappointment of officers is necessary and when it is not.

2. *The duties performed by a military judge are germane to his duties as a military officer*

a. The military is in important respects a "specialized society separate from civilian society." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). It depends on its members—and particularly its officers—to perform a variety of essential tasks that ordinarily would be performed by specialists in the civilian sector. Military officers must be able to master and perform a wide range of jobs and missions, including a variety of tasks inherent in the enforcement of military order and discipline. The vehicle ultimately responsible for enforcing discipline within the command is the military justice system, and both commanders and subordinate officers play integral roles in the operation of that system.

Although military lawyers handle most of the services' legal work, nonlawyer officers play an active role in military legal affairs as well. For more than 200 years Congress has determined that the overriding need for discipline and readiness requires that every officer as a part of his general duties participate in the operation of the military justice system. That fundamental proposition has remained constant in

times of war and peace despite the significant evolution of the military justice system for the past 200 years, and it remains vital in the military justice system even today.

The UCMJ assigns officers a variety of judicial and quasi-judicial functions. Commissioned officers have a duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Commanding officers are authorized to impose "non-judicial punishment[s]," which may include restricting a servicemember's freedom of movement for up to 60 days, and imposing forfeitures of pay and reductions in rank. Art. 15, UCMJ, 10 U.S.C. 815. When an accused is confined pending a court-martial, his commander is required to make a prompt probable cause determination that continued confinement is warranted. Rule for Courts-Martial 305(h)(2). Commanders may also authorize searches for criminal evidence. Mil. R. Evid. 315(d)(1).

Officers also have quasi-judicial duties in connection with post-conviction review. Every officer who convenes a general or special court-martial has the authority to review and modify the court's findings and sentence. Art. 60, UCMJ, 10 U.S.C. 860. Moreover, the clemency power conferred on each service Secretary by Article 74 of the UCMJ, 10 U.S.C. 874, is exercised by clemency and parole boards whose members include officers who are not judge advocates. See Secretary of the Navy Instruction 5815.3G; Air Force Regulation 125-18; Army Regulation 15-130; *Coast Guard Personnel Manual* [COMDTINST M1000.6A].

Any commissioned officer on active duty is qualified to serve as a court-martial member. Art. 25(a),

UCMJ, 10 U.S.C. 825(a). When proceedings are conducted in the absence of a military judge, as can be the case in a special court-martial and is almost always the case in a summary court-martial, the officer or officers conducting the court-martial resolve those issues that would otherwise be handled by the military trial judge. Art. 51, UCMJ, 10 U.S.C. 851.

Commissioned officers may also be appointed as investigating officers empowered to preside over hearings and recommend that charges be referred to trial by general court-martial. Art. 32, UCMJ, 10 U.S.C. 832; Rule for Courts-Martial 405(d)(1).[5] An officer may order that enlisted personnel be confined pending resolution of charges. Art. 9(b), UCMJ, 10 U.S.C. 809(b). And an officer may be appointed as a magistrate to review a commander's decision to order a servicemember into pretrial confinement. Rule for Courts-Martial 305(i)(2).

Commissioned officers also participate in a variety of quasi-judicial roles outside the military justice system. For example, commissioned officers may serve on administrative fact-finding bodies convened to investigate specific incidents.[6] One such tribunal is a

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[5] Officers appointed to Article 32 investigations exercise judicial functions similar to those performed by civilian judges or magistrates at preliminary hearings. *United States* v. *Collins*, 6 M.J. 256, 258-259 (C.M.A. 1979).

[6] See Arts. 135, 139, UCMJ, 10 U.S.C. 935, 939; *Manual of the Judge Advocate General of the Navy* [JAGINST 5800.7C], Ch. 2; *Coast Guard Administrative Investigations Manual* [COMDTINST M5830.1]; Air Force Regulation 120-3 (outlining procedures for investigating boards); Air Force Regulation 11-31 (detailing procedures for appointing a board of officers); Army Regulation 15-6 (appointment of investigating officers and boards of officers).

"court of inquiry." A court of inquiry is authorized to "investigate any matter," and its proceedings are conducted like a formal trial. The court of inquiry decides facts and makes recommendations if required to do so by the convening authority. Art. 135, UCMJ, 10 U.S.C. 935. In addition, a military tribunal is convened whenever a complaint is made to a commanding officer that willful damage has been done to the property of another person or that his property has been taken by members of the armed forces. Art. 139, UCMJ, 10 U.S.C. 939. And certain officers perform quasi-judicial duties to investigate and act on a complaint by a soldier that he has been wronged by his commanding officer. Art. 138, UCMJ, 10 U.S.C. 938. Officers may also serve as recorders representing the government's interest at hearings considering the administrative separation of a servicemember, and they may be appointed to serve as board members at such hearings.[7]

In short, it has always been and continues to be the business of military officers to conduct the adjudicative functions of the armed forces, whether civil, criminal, or disciplinary in nature. Not only does the military regulatory structure anticipate that any qualified commissioned officer may undertake the

[7] See Secretary of the Navy Instruction 1920.6A; *Naval Military Personnel Manual* § 3640350, at 36-52 through 36-56; Marine Corps Order [MCO] P1900.16 (*Marine Corps Separation and Retirement Manual*); *Coast Guard Personnel Manual* [COMDTINST M1000.6A]; Air Force Regulations 11-31, 39-10, 36-2 and Army Regulations 635-100, 635-200 (procedures for separating Air Force and Army officers and enlisted personnel). Officers also can be appointed to Foreign Claims Commissions empowered to adjudicate monetary claims made against the United States by foreign nationals. See, *e.g.*, Army Regulation 27-20; JAGINST 5800.7C, Ch. 8.

functions of a military judge at some point in his military career, but it also anticipates that any commissioned officer—even an officer lacking the qualifications of a military judge—may at some point be called on to perform quasi-judicial functions. Given the nature of the responsibilities inherent in becoming an officer in the armed forces, the duties of a military judge are germane to those of a military officer for Appointments Clause purposes. *Shoemaker*, 147 U.S. at 301.

b. Petitioners argue that the scope and significance of the duties of a military judge requires that those performing those duties be separately appointed to that position. Br. 21-26. But that argument proves far too much. Military officers are called upon to perform a wide variety of tasks—many of which involve life or death decisions for the servicemembers in their command—without the need for constitutional reappointment every time they take on a new and different assignment. The responsibilities of the commander of a division-sized ground force, a bomber wing, or a nuclear ballistic-missile submarine are more significant and more varied than any duty assigned to a military judge. Yet no one would seriously claim that the officers chosen for such widely different and specialized assignments must be separately reappointed to them under the constitutionally prescribed procedure. The result should be no different when commissioned officers are assigned to serve as judges.

The assignment of qualified commissioned officers to serve as military judges (without a second appointment pursuant to the Appointments Clause) is mirrored in the procedures routinely used to delegate most military tasks. Military assignments—particu-

larly temporary assignments—are typically not made by the President, with the advice and consent of the Senate, or even by the Secretary of Defense or the Secretaries of the different services. Compare, *e.g.*, 10 U.S.C. 3065(c) (authorizing members of the Army assigned or appointed to one branch to be detailed for duty with any other branch), with 10 U.S.C. 3283 (authorizing Secretary of the Army to assign and transfer commissioned officers among branches).

Congress has not hesitated to demand a role concerning the appointment of military officers to certain particularly sensitive duties.[8] Congress could have demanded a similar role in the designation of military judges, but instead left their selection to the Judge Advocates General, the officers primarily responsible for implementing the UCMJ, subject to congressionally prescribed standards. Arts. 26, 66, UCMJ, 10 U.S.C. 826, 866.[9] Petitioners thus cannot claim that

[8] See, *e.g.*, 10 U.S.C. 152, 154 (Senate confirmation required for appointment of Chairman and Vice-Chairman of the Joint Chiefs of Staffs); 10 U.S.C. 5033, 5035 (same for Chief and Vice Chief of Naval Operations); 5043, 5044 (same for Commandant and Assistant Commandant of the Marine Corps); 5137 (same for Surgeon General of the Navy); 5141 (same for Chief of Naval Personnel); 5142 (same for Chief of Chaplains); 5148, 5149 (same for Judge Advocate General and Deputy Judge Advocate General of the Navy).

[9] Petitioners suggest that assignment to duty as a military judge is fundamentally different from assignment to other duties because a person appointed as a military judge must satisfy certain congressionally mandated standards above and beyond being an officer. Br. 19. The fact that a particular assignment requires particular qualifications does not ipso facto require that the incumbent be appointed to that office pursuant to Appointments Clause procedures; if that were so, persons assigned to service as trial and appellate counsel pursuant to Articles 27 and 70 of the UCMJ, 10 U.S.C. 827, 870, could not be assigned by the Judge Advocate General, because those persons must satisfy the criteria set forth in Article 27(b)(1) of the UCMJ, 10 U.S.C. 827(b)(1).

they are invoking the Appointments Clause in defense of legislative prerogative.

Petitioners contend that the germaneness theory of *Shoemaker* is inapplicable because Congress has authorized the appointment of civilians to serve as judges on courts of military review. Br. 17. That provision, however, has no relevance to this case, because no civilian has served on the Navy-Marine Corps Court of Military Review during the consideration of petitioners' appeals.[10] The only question presented here is whether the Navy Judge Advocate General has lawfully assigned to the Navy-Marine Corps Court of Military Review officers who constitutionally may exercise authority in that position. *Buckley*, 424 U.S. at 126, 141. As explained above, the persons who

[10] Petitioners note that two civilians sit on the Coast Guard Court of Military Review. As the plurality below pointed out, Congress authorized civilians to serve on the courts of military review to accommodate the manpower needs of the Coast Guard. Pet. App. 19a-20a (citing *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1189 (1949)). The Secretary of Transportation, a "Head of Department" within the meaning of the Appointments Clause, has eliminated any issue as to the validity of those appointments by adopting the appointments previously made by the Department's general counsel. See *United States* v. *Carpenter*, No. 67,757 (C.M.A. Aug. 3, 1993), slip. op. 22 n.1; *United States* v. *Webster*, No. 996 (C.G.C.M.R. May 18, 1993), slip op. 15-16.

served on the trial and appellate benches in this case were military officers lawfully assigned to serve in those capacities.[11]

Finally, petitioners express concern that to uphold the assignment of military officers as military judges on germaneness grounds would lead to absurd results, permitting, for example, a person appointed to serve as United States Attorney for the District of Alaska to be assigned to head the Antitrust Division or a trial attorney at the National Labor Relations Board to serve as an Administrative Law Judge. Br. 23. But our theory has no such implications. Service as a military judge is germane to the responsibilities of military officers because, except where Congress has specifically so provided, military officers are expected to be ready to serve in a wide variety of capacities throughout the military system. The office of military officer is thus a broad one by definition and tradition. The responsibilities of the office of United States Attorney, by contrast, are narrowly confined by statute and regulation, and do not extend to service as the head of the Antitrust Division. Likewise, the responsibilities of a trial attorney with the National Labor

[11] Petitioners try to distinguish *Shoemaker* on other grounds, Br. 17-18, but none is persuasive. For example, petitioners note that the positions challenged in *Shoemaker* were temporary, but that fact played no role in the Court's decision; temporary violations of Article II are violations nonetheless. Petitioners also note that a majority of the commission was validly appointed, but that fact, too, played no role in the Court's decision. Finally, petitioners state that the ruling in *Shoemaker* rested on the need to have flexibility in the operation of government. That proposition supports us, not petitioners.

Relations Board do not extend by statute, regulation, or usage to service as an Administrative Law Judge. On the other hand, if Congress appointed several persons to serve as Assistant Attorneys General without restriction to a particular Division of the Department of Justice, there would be no Appointments Clause violation if those persons were assigned to responsibilities with different Divisions, even if the assignment were made by the Deputy Attorney General, rather than by the President, the Head of a Department, or a Court of Law. Similarly, if the defined responsibilities of trial attorneys at the National Labor Relations Board included occasional service as Administrative Law Judges, that service would be germane for constitutional purposes to their appointment as trial attorneys. Because military officers have responsibilities that, by definition, extend to participation in the military justice system including, for those qualified, service as military judges, their assignments within the military justice system do not require separate appointment under the Appointments Clause.[12]

[12] Petitioners' reliance on *Freytag* v. *Commissioner* to make the contrary argument is misplaced. At issue there was a challenge to a statute creating the United States Tax Court as an Article I court and authorizing the Chief Judge of that court to appoint special trial judges to hear certain proceedings. This Court held that the special trial judges were inferior officers subject to the Appointments Clause; that the Tax Court was a "Court[] of Law" for purposes of that Clause; and that Congress could vest the appointing power in the chief judge of that court. 111 S. Ct. at 2640-2646 *Freytag* did not involve the question whether an officer who has already been properly appointed pursuant to Article II must be reappointed before assuming additional germane duties.

B. If The Present Method Of Assigning Military Judges Violates The Appointments Clause, Petitioners' Convictions Should Be Affirmed Under The De Facto Officer Doctrine

If the Judge Advocates General cannot appoint military judges, prior appointments by those officials should nonetheless be given effect under the "de facto officer" doctrine. Under that doctrine, a "person actually performing the duties of an officer under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945); see also *Buckley*, 424 U.S. at 142-143.[13]

This Court long ago recognized the concept of de facto validity and the de facto officer rationale. *Norton* v. *Shelby County*, 118 U.S. 425 (1886). This Court stated in *Norton* that when an individual claiming a de jure office is in possession of an office that does validly exist, he is performing its duties, and he claims to be such officer under color of election or appointment, that individual is a de facto officer. 118 U.S. at 441-449; see also *Buckley*, 424 U.S. at 142-143 (refusing to invalidate the prior acts of the Federal Election Commission despite ruling that the commissioners were not constitutionally appointed); *Franklin Savings Ass'n* v. *Director, Office of Thrift Supervision*, 934 F.2d 1127, 1149-1150 (10th Cir. 1991), cert. denied, 112 S. Ct. 1475 (1992); *Ryan* v. *Tinsley*, 316 F.2d 430, 431-432 (10th Cir.), cert. denied, 375 U.S. 17 (1963). The de facto officer rationale, which gives validity to acts of officers regardless of any defects in the legality of their appointment or election, "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441.

[13] The dissenting judges below acknowledged that the de facto officer doctrine might be applicable here. Pet. App. 36a, 71a (Sullivan, C.J., dissenting), 85a & n.9 (Wiss, J., dissenting). In a subsequent decision, the Court of Military Appeals has invoked the de facto officer doctrine to uphold the conviction of a member of the Coast Guard whose conviction was reviewed by a panel that included a judge whose appointment the Court of Military Appeals held invalid under the Appointments Clause. *United States* v. *Carpenter*, No. 67,757 (C.M.A. Aug. 3, 1993), slip op. 10.

In this case, both "policy and necessity" favor application of the de facto officer doctrine. *First*, petitioners do not maintain that the present method of appointing military trial and appellate judges had an actual, adverse effect on the outcome of their cases. Instead, their claims are systemic attacks on the structure of the military judiciary. Because petitioners have failed to demonstrate that the current system of appointment has prejudiced their right to receive an impartial trial and appeal, any error should not affect the validity of their convictions. *Second*, unlike the county commissioners in *Norton*, the judges in these cases were not "usurpers," without authority or function. 118 U.S. at 441; *id.* at 441-449. They occupied de jure offices and performed the well-defined functions of those offices. *Third*, because the Court's judgment would be applicable to every pending prosecution in the military system and every direct appeal in which the claim has been properly preserved, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), an adverse decision on this issue would have a devastating effect

on the operation of the military justice system.[14] Invalidating convictions on a ground unrelated to guilt or innocence, where the convictions have been obtained consistent with statutory mandate, would impose an unnecessary hardship on the military services.

Accordingly, should the Court decide that the present method of appointing military judges is unconstitutional, it should nonetheless uphold the convictions in these cases under the de facto officer doctrine. The Court also should stay the effectiveness of its ruling for a reasonable period to give Congress and the Executive an opportunity to develop procedures dures for the appointment of military judges consistent with the Court's mandate. The Court has followed that procedure in similar cases in the past, see *Bowsher* v. *Synar*, 478 U.S. 714, 736 (1986); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Buckley*, 424 U.S. at 142-143, and it should do so here.

II. DUE PROCESS DOES NOT REQUIRE THAT MILITARY JUDGES HAVE A FIXED TERM OF OFFICE

Petitioners' second claim is that, regardless of how military trial and appellate judges are appointed, due process requires that they hold their offices for some fixed term in order to ensure that they will act as impartial adjudicators. Br. 26-45. Petitioners, however, can find no support for their claim in the text of the Constitution or in the relevant legal history. Rather, they argue that because the benefits of tenure

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[14] In fiscal year 1991 alone, the service conducted 2610 general courts-martial, and the military appellate courts reviewed 5183 cases. *Annual Report on Military Justice*, 34 M.J. at LVII-CXLIII (1992).

would outweigh its costs, due process requires some kind of judicial tenure in the military justice system.

Petitioners' submission would require this Court to engage in an undirected line-drawing exercise in defining the judicial tenure obligations imposed by the Due Process Clause in the military setting; it ignores this Court's decisions rejecting similar claims of implied bias; and it disregards other safeguards in the military justice system that are designed to ensure that military judges are impartial. More fundamentally, petitioners' claim ignores a basic principle governing this Court's review of legal challenges to military practices and procedures.

As the Court has recognized, Congress and the President are accorded great deference in designing military institutions. *Parker* v. *Levy*, 417 U.S. at 743. Judicial deference "is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981); *id.* at 64-67; *Goldman* v. *Weinberger*, 475 U.S. 503, 506-508 (1986). That deference extends to challenges to the system of military justice. See *Solorio* v. *United States*, 483 U.S. 435, 447-448 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. * * * [W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated."); *Chappell* v. *Wallace*, 462 U.S. 296, 300-301 (1983) (noting the "need and justification for a special and exclusive system of military justice[.] * * * It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights,

duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."); *Schlesinger* v. *Councilman*, 420 U.S. 738, 753 (1975) (noting "the deference that should be accorded the judgments of the carefully designed military justice system"); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) ("The constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action.").

This is not to say that the Due Process Clause is inapplicable to the military justice system. See *Rostker*, 453 U.S. at 67. But due process does not demand that the military justice system mirror the civilian system, or that every feature deemed essential in the civilian system be found in the military justice system as well. Because petitioners have not demonstrated that the military justice system results in fundamental unfairness on account of the absence of judicial tenure, their due process claim fails to overcome the strong presumption in favor of the constitutionality of the system devised by Congress and implemented by the Executive to adjudicate criminal cases in the military. As this Court put the matter in an analogous setting in *Middendorf* v. *Henry*, 425 U.S. at 44, the Court need only decide whether the factors militating in favor of tenure for military judges "are so extraordinarily weighty as to overcome the balance struck by Congress."

A. A Due Process Violation In This Case Cannot Be Based On A Balancing Of The Perceived Costs And Benefits Of Judicial Tenure In The Military

1. Petitioners argue that their due process claim must be tested under the analytical framework

adopted in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Br. 28-36. *Mathews* involved the question whether due process guarantees a person receiving disability benefits an evidentiary hearing before his benefits can be terminated by an administrative agency. In answering that question, the Court formulated a three-part balancing test that focuses on (1) the private interest that would be affected by the decision; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved as well as the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 334-335. Petitioners' reliance on *Mathews*, however, is misplaced.

In *Medina* v. *California*, 112 S. Ct. 2572 (1992), this Court rejected a similar claim that the *Mathews* test should be applied to measure the validity of procedural rules that govern the criminal process. The defendant in *Medina* relied on the *Mathews* test in arguing that a California law placing on a defendant the burden of proving his incompetence to stand trial violated the Due Process Clause. This Court rejected both the defendant's specific claim and the assumption on which his argument rested. As the Court made clear, "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." *Id.* at 2576.

The Court in *Medina* stated that in the field of criminal law, "we have defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, [b]eyond the

specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." 112 S. Ct. at 2576 (internal quotation marks omitted). The Bill of Rights, the Court explained, "speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Ibid.* Thus, a rule or practice governing the criminal process violates principles of due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 2577.

Petitioners seek to limit *Medina* to its facts, contending that the *Medina* framework should be applied in "only those cases involving attempts to impose due process requirements through altering the burden of proof to favor the defendant." Br. 34. As the passages quoted above make clear, however, *Medina* cannot bear that reading. The opinion states that the correct analytical framework "includ[es]" issues such as "the burden of producing evidence and the burden of persuasion," 112 S. Ct. at 2577 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)); it does not suggest that its analysis is confined to such matters. Moreover, the Court has applied the same due process analysis to other issues of criminal procedure, not involving the allocation of the burden of proof. See *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (use of evidence of a prior acquittal); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (preindictment delay in filing charges); and *Snyder* v. *Massachusetts*, 291 U.S. 97, 104-105 (1934) (jurors'

visual examination of crime scene in defendant's absence); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975) (declining to apply this Court's decisions involving "the relatively recent application of variable procedural due process in * * * termination of government-created benefits" in a case that "deal[s] with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment"). Last Term, the Court applied the *Medina* framework in *Herrera* v. *Collins*, 113 S. Ct. 853, 864 (1993), which involved a due process challenge to a state time limit for filing motions for a new trial based on newly discovered evidence. It is thus clear that *Medina* sets forth the appropriate due process framework for criminal cases generally, and that it is not limited to rules dealing with the allocation of burdens of proof.

Nor is there any force to the argument of amicus Air Force Appellate Division, Br. 10, that the approach articulated in *Medina* was based on federalism concerns and should not be applied in cases involving the federal government. The Court in *Medina* relied on cases arising from the federal criminal justice system, such as *Dowling* and *Lovasco*, both of which articulated a similar approach for cases involving the federal government. Moreover, as the Court explained in *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-757 (1975), deference of the sort owed to the States in reviewing their criminal procedures is owed as well to the military in reviewing challenges to the system of military justice.

2. The problem of fashioning an appropriate remedy for what petitioners claim is a fundamental constitutional defect in the court-martial process demonstrates why the challenge they raise is better ad-

dressed to Congress than to the courts. Were this Court to hold that a military judge must have a fixed term of office, it would be necessary for the courts to fix a minimum term of office for those judges, or establish criteria to determine how terms will be fixed or when judges may be removed. Ultimately, the courts would have to ask what fixed term is sufficient: 15 years?, 5 years?, 6 months? While Congress has selected various terms for different officers, that determination is quintessentially legislative; for a court to determine the minimum acceptable term (and conditions) of tenure for a military judge would require the court to engage in a standardless line-drawing exercise. In making that decision, the court would need to consider the effect of its actions on the ability of the armed forces to carry out their mission, and whether there should be exceptions (as petitioners suggest) for proceedings held overseas, in wartime, during periods of force reduction, and perhaps in other settings. Those policy judgments are far better suited to the political branches, which have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14; Art. II, § 2, Cl. 1, and the duty to make whatever judgments are necessary to resolve those matters.

3. The political branches have not overlooked this issue; on the contrary, they considered it less than a decade ago. In 1984, Congress directed the Secretary of Defense to establish a commission to study and make recommendations regarding (among other things) whether military judges should have tenure. Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b), 97 Stat. 1404-1405, as amended by the Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, Tit. XV, § 1521, 98 Stat. 2628 (1984).

After holding hearings on this question, the commission recommended that military judges should not have tenure, for several reasons.

The commission determined that military judges enjoy independence within the military justice system; that military judges have the equivalent of tenure in the form of stable tours of duty; and that there were no reported instances in which a military judge was sought to be removed because of the content of his decisions. The commission also noted that job rotation and reassignment were indispensable for an officer to advance through the ranks in the military, because such a progression gave an officer experience in various aspects of the service. Assigning officers to positions as military judges for a long fixed period would be detrimental to their career advancement within the armed forces, which, in turn, could dissuade ambitious candidates from seeking duty as military judges, thereby weakening the bench in the military justice system. The commission concluded that the military's need to maintain assignment flexibility outweighed any benefit to military judges by granting them a fixed term of office. See 1 *The Military Justice Act of 1983, Advisory Commission Report, Commission Recommendations and Position Papers* 8-9 (1984).[15] Since receiving the Commission's report, Congress has amended the UCMJ by directing the President to adopt procedures for the investigation of charges concerning a military judge's fitness to carry out his judicial duties. Art. 6a, UCMJ, 10 U.S.C. 806a (Supp. IV 1992). In all other relevant respects, Congress and the President have

[15] The need for flexibility in the assignment of senior military personnel is also heightened by the reductions in personnel now underway in the services.

decided to keep the military judiciary where it stood in 1983. Accordingly, the absence of fixed terms for military judges is not an unexamined relic of our common law heritage, but reflects the contemporary and considered judgment of the political branches that judicial tenure is both unnecessary and unwise. This Court should not second-guess that judgment in the guise of applying a due process balancing test.

B. Neither The Constitutional Text Nor The Relevant Constitutional History Supports Petitioners' Claim That Military Judges Must Have Fixed Terms Of Office

1. The Constitution defines fixed terms of office for certain Officers of the United States. The President and Vice-President hold office for the same four-year term, Art. II, § 1, Cl. 1; Members of the House of Representatives hold office for two years, Art. I, § 2, Cl. 1; and Senators hold office for six years, Art. I, § 3, Cl. 1. "Judges" of the "supreme and inferior Courts" hold office "during good Behaviour," Art. III, § 1, but that provision does not apply to Article I judges, including judges in the military justice system. *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955) ("[T]he Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will."); see *Palmore* v. *United States*, 411 U.S. 389, 410 (1973) (due process does not require life tenure for Article I judges). Otherwise, the Constitution is silent about the term of office to be held by any member of the government.

The Constitution, of course, contemplates that there will be other "officers" of the federal government, see

Art. II, § 2, Cl. 1 (President may ask for the opinion of "the principal Officer in each of the executive Departments"); Art. II, § 2, Cl. 2 ("inferior Officers"), including officers of the armed forces; Art. II, § 2, Cl. 1 ("The President shall be Commander in Chief of the Army and Navy."). But the Constitution does not fix a term of office for such positions. Rather, it leaves that matter to the political branches to define as need be, see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958); *Morrison* v. *Olson*, 487 U.S. 654 (1988), or it vests in the President as Chief Executive the authority to decide how long an officer should serve, see *Myers* v. *United States*, 272 U.S. 52 (1926). In short, the text of the Constitution manifests that the selection of judges in the military justice system "involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Northern Pipeline*, 458 U.S. at 66 (plurality opinion).

2. Petitioners argue that military judges must have a fixed term, because tenure is a fundamental component of the civilian judicial tradition. But that analogy is inapt. Underlying petitioners' argument is the concern that a judge will not run the risk of making an unpopular judgment if doing so will cost him his job. That risk is not present in the military justice system, at least not to the same degree. Reassignment to nonjudicial duties in the military does not entail expulsion from the service and loss of pay, rank, status, and retirement eligibility. Unlike their civilian counterparts, military judges do not risk becoming impoverished by making unpopular legal rulings. In addition, because it is standard procedure

for military judges to serve only a limited term, rather than make a career as a military judge, being transferred after serving a tour of duty as a judge in the military would not be seen as a demotion, nor would it harm an officer's career prospects within the service or in civilian life.

Equally important is that the military justice system historically has functioned quite differently from civilian criminal courts. Whether elected or appointed, civilian judges are participants in the political process, *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991); *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), so it is not surprising that they typically enjoy some form or degree of tenure. But that is not to say that judicial tenure is a necessary component of due process, particularly in the quite different military setting. The critical question is whether the absence of tenure of some undefined period for military judges results in the denial to servicemembers of a fair trial and fair consideration of their cases on appeal.

3. History proves that it does not. To read into the Constitution, at this late date, a requirement of fixed terms of office for military judges, "[o]ne must ignore history, tradition, and practice for [more than] two centuries." *Middendorf*, 425 U.S. at 50 (Powell, J., concurring). When viewed against the historical background, the assignment flexibility in the current court-martial system does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 112 S. Ct. at 2577.

Courts-martial in this nation have been conducted for more than 200 years without any kind of judicial tenure for the presiding officer. Yet if this long-

standing practice were as certain to lead to fundamentally unfair outcomes as petitioners claim, it is difficult to understand why this claim has been so slow in surfacing. The fact that the American court-martial system "has been practised for two hundred years by common consent" without judicial tenure is a powerful testament to its constitutional validity. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.).

English military tribunals served as the model for our own military justice system. Although military justice was initially the responsibility of the Court of Chivalry, the growth and geographic distribution of British military forces prompted the crown to authorize the formation of panels of officers, known as courts-martial, to adjudicate military cases. Those courts were convened by a general, who sat as the presiding judge or president; no tenured military judge controlled the proceedings. Schleuter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 136, 138-140 (1980).

In America, the Revolutionary War provoked the need for a written code of conduct to govern the soldiers of the new Continental Army, and the Continental Congress adopted Articles of War that were based largely on the British model. Under the Articles of War of 1775, a general court-martial consisting of officers was convened by a general officer (or an equivalent commander) and was empowered to inflict such punishment as it found appropriate, including death. No tenured judge presided over those tribunals. William Winthrop, *Military Law and Precedents* 21-22, 953-960 (2d ed. 1920) [hereinafter Winthrop].

Throughout the 19th century, court-martial proceedings were conducted without a judge's super-

vision. A "judge advocate" was typically assigned to the court-martial by the convening officer to act both as prosecutor and as counsel to the defendant. Art. 6 of Articles of War of 1786, *reprinted in* Winthrop 972; Art. 74 of Articles of War of 1874, *reprinted in* Winthrop 992.

In 1916, Congress created the three types of courts-martial that exist today and required a convening authority to appoint a judge advocate to general and special courts-martial. As under the prior regime, the judge advocate's primary role was that of prosecutor, but he was also to act as an advisor to the accused when the latter was not represented by counsel. Act of Aug. 29, 1916, ch. 418, § 3, Arts. 3, 11, 17, 39 Stat. 651, 652, 653. The president of a court-martial usually was not a lawyer, and as under prior practice the court-martial members voted on evidentiary and procedural motions. Art. 31, 39 Stat. 655; F. Gilligan & F. Lederer, *Court-Martial Procedure* 11 (1991).

In 1920, Congress formally designated a "law member" who would be detailed by the convening authority to general courts-martial in the Army. Act of June 4, 1920, ch. 227, ch. II, § 1, Art. 8, 41 Stat. 788. This officer had the power to rule on questions regarding the admission of evidence, but he could be overruled by a majority of the court-martial panel members on other such matters. Art. 31, 41 Stat. 793.[16] The law member participated in the court-

[16] As the Court of Military Appeals noted, "[u]ntil 1951, the Navy and Coast Guard continued the pre-1920 practice of using non-lawyers to preside over courts-martial and decide interlocutory questions." Pet. App. 10a (citing *Naval Courts and Boards* §§ 379, 381 (1937); U.S. Coast Guard, *Manual for Courts-Martial* ¶ 385(t), at 134 (1949)).

martial's deliberations and had an equal vote concerning the findings and the sentence. *Ibid.* Article 50½, 41 Stat. 797-799, also required the Judge Advocate General to designate "a board of review consisting of not less than three officers" of his department to review the sentences imposed by a general court-martial. Under Article 36, 41 Stat. 794, special and summary courts-martial continued to be reviewed only by the officer who had convened that court.[17]

Dissatisfaction with the operation of the military justice system during World War II ultimately led Congress to enact the Uniform Code of Military Justice, ch. 169, § 1, 64 Stat. 107 (1950) (codified at 50 U.S.C. 551-736 (Supp. IV 1950), recodified at 10 U.S.C. 801-940 (Supp. IV 1956)). Under Article 26 of the UCMJ, 64 Stat. 117, all general courts-martial required the presence of a "law officer" who was a member of the bar and was certified for such duty by the Judge Advocate General. The law officer was barred from deliberating and voting with the other members. Instead, he ruled on interlocutory questions and provided instructions to the court. Arts. 51(b) and (c), 64 Stat. 124-125. The president of the court-martial—who, once again, was usually not a lawyer—still had those responsibilities in special courts-martial. Article 66(a) of the UCMJ, 64 Stat. 128, also created boards of review for all the services constituted in the offices of the respective Judge Advocates General and "composed of not less than three officers or civilians, each of whom shall be

[17] A Board of Review was not established in the Navy. Instead, field commanders were entrusted with reviewing records of courts-martial convened by them or their subordinates. See *Naval Courts and Boards* § 472.

a member of the bar of a Federal court or of the highest court of a State of the United States." [18]

The Military Justice Act of 1968, Pub. L. No. 90-632, §§ 2(8), (9), 82 Stat. 1336, changed the title of "law officer" to that of "military judge" and more formally identified that officer as the presiding officer in courts-martial. Article 26(b) of the Code required a trial judge to be a commissioned officer, a member of a state or federal bar, and certified by the Judge Advocate General as qualified for that duty. 10 U.S.C. 826(b). Article 66(a) of the UCMJ, 10 U.S.C. 866(a), fixed similar requirements for military appellate judges, reflecting the fact that the Boards of Review functioned as appellate courts and the officers assigned to them as appellate judges. But the 1968 amendments did not provide for tenure either for officers assigned to serve as military trial judges or for those assigned to serve on the courts of military review.

In sum, for more than 200 years Congress has passed legislation for the operation of the military justice system without once providing any tenure for military officers performing judicial roles. Winthrop 179-204. That longstanding, consistent judgment by the branches responsible for governance of the nation's armed forces is entitled to considerable respect. See *Solorio*, 483 U.S. at 447.

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[18] Congress had earlier created a Board of Review for the Air Force in 1948. Act of June 25, 1948, ch. 648, 62 Stat. 1014.

C. The Use Of Fixed Terms Of Office For Military Judges Is Not Necessary To Ensure Independence And Impartiality

1. Petitioners and amici claim that due process requires that military judges have a fixed term of office in order to ensure that they are independent from their superiors and from the government in general. Otherwise, petitioners contend, there is too great a risk that military judges will favor the prosecution in order to avoid being transferred from that duty in the military justice system to other military duties, with a resulting injury to their professional careers. Petitioners concede that due process does not require life tenure, see *Palmore* v. *United States*, 411 U.S. at 410, but they argue that some term of office is necessary to ensure the fact and appearance of impartiality.

Petitioners' claim is, in effect, a claim of implied bias. This Court, however, has consistently refused to adopt a rule of implied bias in other, related contexts. For example, *Dennis* v. *United States*, 339 U.S. 162 (1950), involved a contempt conviction for the failure to appear before the House Un-American Activities Committee. The Court rejected the argument that the jury, composed primarily of employees of the United States, was inherently biased. Dennis argued that the employees, who were subject to an executive order providing for their discharge upon reasonable grounds to believe that they were disloyal to the government, would not risk being dismissed by voting for acquittal. The Court rejected that claim of implied bias, noting that the "way is open in every case to raise a contention of bias," *id.* at

168, and that Dennis had failed to show actual bias on the part of the jurors in his case, *id.* at 172:

> Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determination, the sense of responsibility and the individual integrity by which men judge men.

More recently, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court rejected the claim that bias should be imputed to a juror who had an application for employment pending with the prosecuting attorney's office at the time of the trial. The Court stated that the "safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge," while not infallible, adequately protect the right to an impartial jury. *Id.* at 217. See also *United States* v. *Wood*, 299 U.S. 123 (1936) (government employees are not inherently biased); *Frazier* v. *United States*, 335 U.S. 497 (1948) (a jury composed entirely of government employees, including one juror and the wife of another person employed by the department responsible for enforcing the Act in question, is not inherently biased).

Cases in which the Court has found implied bias involve situations in which the decisionmaker stood personally to profit from a decision in the government's favor. For example, *Tumey* v. *Ohio*, 273 U.S. 510 (1927), involved the legality of a procedure by which the mayor's compensation depended on the

amount of the fines he collected as a judge. See also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822-824 (1986) (judge had a "very similar" lawsuit pending against a party to the case at the time of his decision); *Connally* v. *Georgia*, 429 U.S. 245 (1977) (judge's salary depended in part on number of search warrants issued); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (state administrative board consisted of optometrists in private practice who heard charges filed against licensed optometrists who were competitors of the board members); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (procedure similar to the one in *Tumey*).[19] The procedure at issue here—the lack of a fixed term of office—is not remotely similar to the ones challenged in those cases.

2. Even if Congress were to provide a fairly short period of tenure, to be followed by consideration for reappointment, as petitioners suggest would be constitutionally sufficient, it is far from clear that it would solve the problem of bias about which petitioners complain. If a military judge with a temporary assignment is subject (or perceived to be subject) to pressure from military authorities to favor the prosecution, a judge with a short period of tenure (especially one whose period of tenure is about to expire) would be in the same position. Thus, if petitioners are correct that the absence of tenure leads to bias on the part of military judges, precisely the same claim could be made in the case of at least a

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[19] *In re Murchison*, 349 U.S. 133 (1955), is inapposite. The Court there held that it is unfair for the same person to serve as both a one-man grand jury and the trial judge in the same case. Military judges do not perform any such conflicting functions.

significant subclass of judges unless military judges were all made ineligible for reappointment. Even then, defendants could complain that the specter of unattractive assignments after a period of judicial tenure might adversely influence a military judge's impartiality. Because limited tenure provides, at most, only a limited answer to the complaint of bias that petitioners raise, it is clear that in any event it is to other guarantees against bias that the military justice system must look. We submit that those other guarantees are sufficient to satisfy any due process concerns, even absent a system of tenure for officers assigned to serve as military judges.

3. The UCMJ and the services' implementing regulations are carefully structured to ensure that military judges are independent and impartial.

First, military judges are subject to the *ABA Code of Judicial Conduct* Canon 1 (1972), which requires them to uphold the independence and integrity of their courts. *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328, 336 (C.M.A. 1988). Moreover, the system for selecting military judges ensures that only the most qualified and experienced officers are selected, and that they are selected after careful and objective screening, which protects against the risk of command influence in the selection process.

Each branch of the armed forces has adopted regulations to ensure that only the most qualified officers will be selected as judges. For instance, the Judge Advocate General of the Army assigns officers to serve as judges based on the recommendation of the Chief Trial Judge and the Chief of Personnel, Plans and Training Office. A trial judge must be a relatively senior officer with several years of experience

in military criminal law assignments, and he also must have completed various educational courses. As a result, a judge on the Army Court of Military Review, for example, is usually a colonel who has obtained experience as a trial judge. See JAGC Personnel and Activity Directory and Personnel Policies, Office of the Judge Advocate General, Department of the Army ¶ 7-1(a) (qualifications of trial judges), ¶ 7-4 (qualifications of appellate judges) (1992-1993); see also Army Regulation 27-10 (describing organization of Army trial judiciary). The other services have similar regulations.[20]

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[20] The Navy-Marine Corps trial judiciary operates as a separate naval activity under the command of the Judge Advocate General. Secretary of the Navy Instruction [SECNAVINST 5813.6C]; Judge Advocate General Instruction [JAGINST 5813.4E]. Nominees for assignment as judges are considered by a judicial screening board established by the Judge Advocate General to ensure that only qualified officers are appointed to the bench. The Air Force has no standing written procedure for the selection of military judges, but traditionally judges have been selected by the Judge Advocate General from nominees identified by a board composed of senior ranking officers of the Judge Advocate General's Department. The Coast Guard has five judges on the court of military review, all of whom were originally appointed by the General Counsel of the Department of Transportation in his capacity as the Judge Advocate General of the Coast Guard. As noted earlier, the Secretary of Transportation has adopted those appointments as his own. Only the Chief Judge of the court is a full-time judge; the other four have other primary duty responsibilities. See generally *Fiscal Year 1992 Annual Report of the Chief Counsel of the Coast Guard*. The Coast Guard has one full-time general court-martial judge and normally six to eight part-time special court-martial judges, all of whom are appointed by the General Counsel of the Department of Transportation. The officers appointed as special court-martial judges are also

Second, the UCMJ has removed military judges from the institutional control of military commanders. Under Article 26 of the UCMJ, 10 U.S.C. 826, a military trial judge is placed under the authority of the Judge Advocate General of each service, not under a court-martial convening authority. Article 26(a) of the Code, 10 U.S.C. 826(a), authorizes the Secretary of each service to issue regulations establishing the manner in which military judges are detailed to courts-martial. In the *Manual for Courts-Martial* the President has required that judges must be detailed to a court-martial by other individuals who are assigned to judicial duties. Rule for Courts-Martial 503(b)(1).

The UCMJ further provides that neither a military commander who has convened a court-martial nor his staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge relating to his judicial duties. Art. 26(c), UCMJ, 10 U.S.C. 826(c). Similarly, no military appellate judge may prepare any report concerning the fitness, advancement in grade, assignment, or retention in the armed service of any other military appellate court judge. Art. 66(g), UCMJ, 10 U.S.C. 866(g).[21]

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assigned other primary duties and are detailed as needed to special courts-martial outside their jurisdictions. See generally *Coast Guard Military Justice Manual* [COMDTINST M5810.C].

[21] For example, the Circuit Military Judge of the Navy-Marine Corps Trial Judiciary is responsible for writing fitness reports on the other junior judges in the circuit. JAGINST 5813.4E; see generally Navy Military Personnel Command Instruction 1611.1A; Marine Corps Order [MCO]

Petitioners are mistaken in claiming that making military judges accountable to the Judge Advocates General weakens the judges' independence. Br. 45-49. That claim misapprehends the role of the Judge Advocates General in the military justice system. In the Military Justice Act of 1968, Congress protected the independence of military judges but also required that those officers, like all other military officers, be held accountable to someone for the performance of their duties. The balance Congress struck between independence and accountability was to place military judges under the direct control of the Judge Advocates General.[22] That legislative judgment concerning

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P1610.7 (detailing procedures for reporting on the fitness of officers). The Chief Judge of the Navy-Marine Corps Trial Judiciary, as the senior officer in the chain of command of the Circuit Military Judges, is authorized to write their fitness reports. *Ibid.* Finally, the Chief Judge of the Navy-Marine Corps Trial Judiciary and the judges of the Navy-Marine Corps Court of Military Review are evaluated by the Judge Advocate General. See *Office of the Judge Advocate General (OJAG) Organization Manual* [JAGINST 5400.1A] §§ 109-110.

[22] See S. Rep. No. 1601, 90th Cong., 2d Sess. 7 (1968): "The intent is to provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the Judge Advocate General of the service and are responsible only to him or his designees for direction and fitness ratings." The Navy-Marine Corps Court of Military Review recently rejected a challenge to the independence of the judges of that court based on the fact that the Judge Advocate General writes their fitness reports:

> [I]t is apparent that [the Judge Advocate General] is more than an administrative functionary in the military justice system—indeed, he is the linchpin that holds the system together and, most important, the key to its integ-

the operation of the armed forces, when viewed in light of the other measures contained in the UCMJ to preserve the independence of military judges, is worthy of the deference and respect traditionally paid by this Court to such matters. See, *e.g.*, *Middendorf*, 425 U.S. at 43-44.

Third, Congress has implemented other protections against command influence through the UCMJ. A military commander may not censure, admonish, or reprimand a court-martial or military judge, nor may he attempt to coerce or influence a court-martial or other military tribunal. Art. 37(a), UCMJ, 10 U.S.C. 837(a). See also Rule for Courts-Martial 104 (outlawing command influence). A convening authority who violates Article 37 is subject to criminal prosecution under Article 98 of the UCMJ, 10 U.S.C. 898.

Fourth, the UCMJ is designed to ensure judicial impartiality and to provide an avenue for relief when the question of impartiality arises in particular cases. Articles 26 and 66(h) of the UCMJ, 10 U.S.C. 826, 866(h), provide that a military trial judge may not preside over a case in which he has an interest or in which he has previously participated. And a military judge may be challenged for cause whenever his im-

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rity. Congress, as well as the Secretary [of the Navy] in the exercise of his statutory authority, has bestowed considerable trust and confidence in the JAG to ensure that the system works as designed: fairly, effectively, and in accordance with the law. * * *

With regard to his supervision of military judges in particular, the JAG is duty-bound to preserve their independence if he is to remain true to the congressional intent behind the Military Justice Act of 1968.

United States v. *Mitchell*, No. 92-1933 (N.M.C.C.M.R. May 24, 1993) (en banc), slip op. 10.

partiality may reasonably be questioned. Rule for Courts-Martial 902.

Finally, Congress has placed the Court of Military Appeals atop the military justice system in part to police the military justice system against any incursions on the independence and impartiality of military judges. The Court of Military Appeals is composed of tenured civilian judges who are not responsible in any respect to military commanders. See *Schlesinger* v. *Councilman*, 420 U.S. at 758 (the Court of Military Appeals is "completely removed from all military influence or persuasion," quoting H.R. Rep. No. 491, 81st Cong., 1st Sess. 7 (1949)). That court can check any efforts to influence a court-martial, and historically the Court of Military Appeals has been vigilant in rebuffing improper attempts to influence military judges.[23] Moreover, that authority is not merely hypothetical. That court has made clear that its decisions prohibit any exercise of improper influence over military judges, including adverse removal

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[23] See, *e.g.*, *United States* v. *Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (court barred official inquiries outside of the adversary process which questioned a military judge's sentence); *United States Navy-Marine Corps Court of Military Review* v. *Carlucci*, 26 M.J. 328 (C.M.A. 1988) (court appointed one of its associate judges as a special master to oversee a Department of Defense investigation of the Navy-Marine Corps Court of Military Review concerning a controversial appellate decision); *United States* v. *Mabe*, 33 M.J. 200 (C.M.A. 1991) (court found that criticism of a Navy trial judge concerning his alleged lenient sentences by the chief of the Navy trial judiciary constituted improper command influence); *United States* v. *Allen*, 33 M.J. 209 (C.M.A. 1991) (court disapproved of a senior Navy lawyer's comment to the chief of the Navy trial judiciary that a certain military judge gave unduly lenient sentences).

actions against military judges as a result of their judicial acts. *United States* v. *Graf*, 35 M.J. at 465.

In sum, the military justice system has ample safeguards to ensure the impartiality and independence of military judges. Due process therefore does not also require that, in order to avoid fundamental unfairness to defendants, all military judges must be granted some kind of tenure in office.

CONCLUSION

The judgment of the Court of Military Appeals should be affirmed.

Respectfully submitted.

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No. 92-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The most notable feature of respondent's brief is its failure to address several of petitioners' key points. Thus, respondent refuses to confront the fact that only military judges may perform certain functions in the military justice system, which substantially undermines its "germaneness" argument, and it fails to acknowledge that, outside the military, virtually every judge who presides at felony trials and sits on appeals from them has a fixed term of office, a consensus that this Court has found highly significant in Due Process cases. In addition, respondent offers no justification for the absence of *any* term of office, other than to indicate that very long terms might be problematic. And, perhaps most significantly, it makes virtually no effort to defend the role that the Judge Advocate General of each service plays in both the appointment and removal of all military judges, a problem that we highlighted in the final section of our opening brief. In Points I and II we address these failures,

as well as the few new arguments that respondent raises.

The one major new point raised -- the *de facto* officer defense -- was not mentioned in respondent's opposition to certiorari, nor in its brief in the Court of Military Appeals, and hence is not properly before this Court. Nonetheless, we respond to it in Point III because the Court of Military Appeals has recently applied the doctrine to uphold a conviction in a Coast Guard case in which it found an Appointments Clause violation. *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993). In reaching that result, which would presumably be binding on petitioners on remand from this Court, that court devoted only one sentence to discussing its conclusion, and cited a single case, *Buckley v. Valeo*, 424 U.S. 1 (1976), which was an action to enjoin the operation of a statute, not, like this case, a criminal proceeding in which the defendants have received very serious sentences. *Carpenter*, 37 M.J. at 295. Accordingly, this reply explains why the *de facto* officer doctrine, which has never been applied to uphold a criminal conviction in a case remotely resembling this one, cannot be relied upon to sustain petitioners' convictions.

In addition, respondent has claimed, in effect, that the military justice system will come to a halt if the Appointments Clause argument (but not the Due Process argument) is decided adversely to it. There are a number of practical reasons why such predictions are vastly overstated, including the fact that even *Griffith v. Kentucky*, 479 U.S. 314 (1987), does not require that every defendant whose conviction is still on direct appeal will automatically be able to overturn both the conviction and the sentence. Nonetheless, we urge the Court *not* to reach those other issues, because other defendants, whose cases involve different facts and whom petitioners' counsel do not represent, are not before the Court.

I. THE UNIQUE FUNCTIONS PERFORMED BY MILITARY JUDGES REQUIRE THAT THEY BE SPECIFICALLY APPOINTED TO THEIR POSITIONS.

Respondent's brief makes clear that the difference between the parties on the Appointments Clause issue turns almost entirely on the meaning of "germaneness" as applied to the new duties that can be added to the holder of an existing office. Thus, the government has again specifically rejected the argument, adopted by the swing vote below, that military judges are not subject to the Appointments Clause. US Br. 10 n.4. Nor does the United States defend the rationale offered by the plurality below who, relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), argued that the functions of military judges were sufficiently germane to those of the former "law officers," whose places they took, that no new appointment was needed. It was in response to that argument that petitioners directed most of their discussion of *Shoemaker* in their opening brief at 17-18.

To defend the current system, respondent begins with a proposition with which we do not disagree: that new duties may be assigned to the holder of an existing office, and no new appointment is required, so long as those new duties are "germane" to the old ones. Thus, for instance, if the duties of federal magistrate judges were increased to allow them to decide issues relating to attorneys' fees, where previously only district judges could do so, no one would suggest that the Appointments Clause would be triggered by that change since those new duties are plainly germane to the old ones. Our difference with the government is over the scope of the germaneness rule, in particular, whether, as the government contends, the duties of military judges are "germane" to the duties of *all* military officers -- not simply those who are trained in the law and designated judge advocates -- so that any military officer, even those who are not members of any Bar, can be "assigned" the duties of a military judge without

further regard to the Appointments Clause.[1]

Respondent's argument -- that any military officer can serve as a military judge -- demeans judicial offices, both inside the military and out, and would almost certainly be rejected out of hand in the civilian context. But even within the military, there are two principal reasons why it cannot be accepted: (1) this approach to germaneness obliterates all limitations on that term, thereby substantially undermining the reasons behind the Appointments Clause, and (2) Congress and the Navy have "assigned" military judges in ways that are directly contrary to such an expansive interpretation of germaneness. Underlying both of our arguments is the fact that Congress has assigned military judges functions that no other persons in the military can perform, which is the strongest evidence of the fact they hold offices separate from those of all other military officers.

According to respondent, all military officers, whatever their military expertise, have judicial or "quasi-judicial" duties, and so "assignment" to them of the duties of a military judge is nothing out of the ordinary. The principal difficulty with this argument is that almost all of the examples cited by respondent on pages 14-17 of its brief fall

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[1]Even this explanation does not justify the fact that under UCMJ Art. 66(a), 10 U.S.C. § 866(a), civilians may be appointed to the Courts of Military Review, as the Coast Guard has long done, and the Navy has done in the past. Respondent argues (Br. 19) that, since no civilians sat on petitioners' cases, the issue of civilian appointments is not before the Court. But petitioners' argument regarding civilians was offered principally to show that Congress surely could not have had the "germaneness" justification offered by the government in mind since that rationale could not apply to civilians. The use of civilians also undermines the claim made at the top of page 13 of respondent's brief that there has been a legislative judgment that reappointment is not necessary, a contention that, we also note, is unsupported by any citation to a statute or legislative history.

into the "quasi-judicial" rather than the "judicial" category, as its brief itself acknowledges.[2] Many of those functions that do relate to the criminal process involve investigations, detention, or apprehension, and are not truly "judicial" functions as that term is commonly understood. Most may be performed in the civilian system by police or other law enforcement personnel, rather than by judges. Some of the functions relate to post-conviction review by the convening authority or participation in clemency or other similar review, neither of which is ordinarily thought of as judicial in nature. And a number of the investigative functions cited by respondent, to the extent that they are not carried out by staff lawyers, are not criminal in nature, and thus cannot support a claim that military judges, who preside over general and special courts-martial, are no different from all other military officers.

One example cited by respondent illustrates how far its argument goes. To support its claim of germaneness, the government notes that "[a]ny commissioned officer on active

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[2]The use of "quasi" calls to mind Justice Jackson's observation about the use of that term in his dissent in *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952): "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." Similarly, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 457 (1987), quotes *Corbin on Contracts* 27 (1st ed. 1952) on the term "*quasi*" as follows: "The term *quasi* is introduced as a WEASEL WORD that sucks all the meaning *of* [read *from*] the word that follows it; but this is a fact that the reader seldom realizes." Or, as the Solicitor General remarked with respect to the Latin phrase "de facto," it "is perhaps best translated as 'not really.'" Brief for the United States as *Amicus Curiae* in *Morales v. Trans World Airlines, Inc.*, No. 90-1604, and *Attorney General of California v. Trans World Airlines, Inc.*, No. 90-1606, October Term 1991 at 17.

duty is qualified to serve as a court-martial member. Art. 25(a), UCMJ, 10 U.S.C. 825(a)." US Br. 14-15. But, under the UCMJ, service on a court-martial panel is analogous to service as a civilian juror not as a judge, which hardly supports the government's germaneness argument for military judges. Moreover, subject to certain limitations, Article 25(c) also allows enlisted personnel to serve on court-martial panels, yet they are obviously not appointed as officers of the United States under the Appointments Clause. Therefore, service as a member of a court-martial cannot be equated with being an officer under the Appointments Clause, let alone a military judge, but is based on the fact of being in the military, as is true for so many other of the investigatory, supervisory, and pre-trial examples relied on by respondent.

Where respondent errs is not so much in categorizing the examples in its brief as functions that judges might perform, but in failing to recognize that there are many functions performed by military judges that no one else in the military is authorized to handle. Thus, only a military judge can preside at a general court-martial, make binding rulings of law on questions of the admissibility of evidence, and instruct the court-martial members on the applicable substantive law governing the offense charged. Yet under respondent's theory of germaneness, *any* commissioned military officer could perform those functions, whether that person was a lawyer, an infantry officer, a civil engineer, a doctor, or a chaplain. And if one were to rely on respondent's court-martial membership analogy, perhaps enlisted personnel, some of whom have never finished high school, could also serve in that capacity.[3]

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[3]Special courts-martial are virtually always presided over by a military trial judge. The UCMJ does allow a special court-martial to be held without a military judge, but in that event a bad conduct
(continued...)

The other powers that only military trial judges may exercise are to act as the sole deciding authority on the guilt or innocence of an accused and to impose punishment, up to life imprisonment, in cases in which the trial is before a judge alone. To be sure, other officers, as well as enlisted personnel and warrant officers, may determine guilt or innocence and impose punishment, but they do so, much like civilian juries, as part of a collective process, not entirely on their own, which only military trial judges can do. UCMJ Art. 16, 10 U.S.C. § 816. This awesome power to decide the fate of an accused, which was added in 1968 as part of Congress' effort to increase the professionalism of military judges, and the authority to issue binding legal rulings, which was also added that same year, are the principal reasons why the government's attempt to lump military judges together with all other military officers must be rejected.

Second, respondent's interpretation of *Shoemaker* is flawed because both Congress and the Navy, in fact, treat the offices of military judges as quite separate and distinct from those held by others in the military. Thus, in UCMJ Art. 26(b), 10 U.S.C. § 826(b), Congress has established special educational and certification requirements for military trial and appellate judges, signalling its view that their functions should not be performed by ordinary military officers, even those trained in the law (military trial judges must be "certified to be qualified for duty as a military trial judge by the Judge Advocate General of the armed force of which such military judge is a member"). While we do not contend that the presence of "congressionally mandated standards above and beyond being an officer . . . ipso facto require[s]" reappointment under the Appointments Clause (US Br. 18

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[3](...continued)
discharge cannot be imposed unless the absence of a military judge was due to "physical conditions or military exigencies." UCMJ Art. 19, 10 U.S.C. § 819.

n.9), these special qualifications are one factor that must be considered in determining whether a separate office has been created, and therefore a separate appointment is required. It also serves to distinguish the command positions for which no new appointment is required cited by respondent on page 17 of its brief.

Furthermore, as we explained on pages 19-20 of our opening brief, but which the government wholly neglects in its brief, the Navy itself treats its judicial offices separately from the rest of even the legal branch of the Navy, as demonstrated by the special board that it has created to recommend that officers be selected as military judges, by their separate oath of office, and even by separate certificates of appointment to that separate office, copies of which were reproduced in Addendum B to our opening brief. Indeed, for someone serving as a general court-martial judge, Congress has specified that he may only take on "duties of a judicial or non-judicial nature other than those relating to his primary duty" with the approval of the Judge Advocate General or his designee. UCMJ Art. 26(c), 10 U.S.C. § 826(c). While respondent has labored mightily to treat appointments as military judges as mere "assignments" of additional duties within the military, it is plain that both the functions performed by military judges and the different treatment accorded military judges by Congress and the Navy make it constitutionally impermissible to equate the duties of military judges with those of all other military officers.[4]

Finally, the expansive view of germaneness urged by respondent and adopted by the Court of Military Appeals would seriously undermine the purposes of the Appointments Clause, which are to assure accountability and to prevent the

[4]Even respondent's attempt to use the term "assignment" to avoid the Appointments Clause failed because note 20 on pages 43-44 in the Due Process section of its brief used the term "appointed," or some variation thereof, no less than five times.

diffusion of power. In our opening brief, we gave examples of reassignments that would apparently be perfectly proper under the government's interpretation (pp 23, 25). In its response (Br. 20-21), the government relies largely on statutory distinctions among the various offices, but never backs away from the constitutional implications of its expansive germaneness test. Indeed, as we read the government's brief, in particular the examples of germaneness on which it relies, it would be constitutionally unobjectionable for the President to reassign the Secretary of Defense to the position of Attorney General, and vice versa, since both have law related duties, and since both have responsibilities relating to the defense of our country. And given the partial overlap of functions between the Army Corps of Engineers and the Environmental Protection Agency, it seems likely that the Secretary of the Army and the Administrator of EPA could fulfill each other's duties under this test of germaneness.

For all of these reasons, as well as those set forth in our opening brief, the appointment of the military trial and appellate judges who heard petitioners' cases did not meet the requirements of the Appointments Clause.

II. RESPONDENT HAS FAILED TO OFFER ANY JUSTIFICATION FOR THE LACK OF ANY FIXED TERM OF OFFICE FOR MILITARY JUDGES.

The principal difficulty with respondent's Due Process argument is what it does not say. Thus, a central theme of petitioners' argument was that the military justice system is unique among criminal justice systems in the United States, both federal and state, as well as for most other adjudicative functions under federal law, because its judges serve at the pleasure of a superior officer. Pet. Br. 27-28, 42-43. This Court has often looked to the consensus of federal and state systems in deciding whether Due Process imposes a particular requirement, as it did in *Medina v. California*, 112

S.Ct. 2572, 2577-78 (1992), on which respondent places principal reliance. US Br. 7, 27-29. Yet nowhere in its brief does the government attempt to justify this gross deviation from the norm that prevails in every criminal justice system in this country that has jurisdiction remotely resembling the power of general and special courts-martial.

For petitioners here, like the petitioner who was tried by the District of Columbia court system in *Palmore v. United States*, 411 U.S. 389, 410 (1973), the absence of an Article III judge does not deprive them "of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to [life] tenure deprives them of due process of law under the Fourteenth Amendment." But, like the petitioner in *Palmore*, these petitioners should be entitled to no less protection than "the citizens of the various States" would have when tried "for local crimes," such as larceny and cocaine distribution for which petitioners Weiss and Hernandez were tried. Stated another way, if Mr. Palmore had been tried before a judge with no term of office, and had his appeal decided by judges who also had no protection against immediate removal, he surely would have had a meritorious Due Process claim. For the same reason, petitioners have established a Due Process violation here, unless there is something about the military justice system that warrants this very significant reduction in the rights of an accused, an issue to which we now turn.[5]

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[5]At one point respondent suggests that military judges really have nothing to fear because, if they lose their judicial appointments, they still have their military office, with no loss of pay (US Br. 33), as if a wrongful removal of an Article III judge could be remedied by payment of money damages. At other places, the government recognizes the real possibility of improper influence on military judges, and it trumpets at length the alternative protections that are supposed to substitute for fixed

(continued...)

The most startling aspect of the Due Process portion of respondent's brief is that it nowhere attempts to explain how military functions would be impaired by fixed terms of office for trial and appellate judges. It does argue that assigning judges "for a long fixed period" would create problems (US Br. 31), but petitioners have never asked for any such rule ("the needs of the military might preclude lengthy terms of office, but that hardly justifies the absence of any term of office at all." Pet. Br. 31). But even that argument is largely based on the need for frequent reassignment to give junior officers a variety of experience, and thus would have no relevance for judges on the Courts of Military Review, who are generally at or near the end of their careers, or, for that matter, for most military trial judges either. Other than that, respondent has offered no reason why there should not be judicial terms of office, other than the fact that the military has never had them.[6]

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[5](...continued)
terms of office. *Id.* at 42-48. Those two positions are basically inconsistent, but the latter is more pertinent because it recognizes that protections are needed so that judges do not tailor their rulings to avoid being transferred to an undesirable place as a punishment for performing in a manner disapproved by their superiors.

[6]Respondent makes much of the fact that the lack of tenure for military judges has existed for over 200 years. US Br. 34-38. Quite apart from the fact that past history alone is never dispositive of Due Process challenges (Pet. Br. 41), that argument overlooks the fact that there were no offices in the military analogous to those now held by military judges until 1968, when the UCMJ was amended to establish the offices of military trial and appellate judges. *Cf. Connecticut v. Doehr*, 111 S.Ct. 2105, 2123 (1991) (Scalia, J., concurring, applying test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), since practice at issue not recognized at common law). And under the pre-1968 system, there were no persons in civilian life who were performing analogous functions to those who

(continued...)

Respondent's principal defense of the practice, under which military judges serve essentially at the pleasure of their service's Judge Advocate General, is its plea for deference. US Br. 25-26, 29-32, 38. Assuming that some deference is owed to Congress on this issue, deference is not simply a blind command to follow, but is, instead, an obligation to proceed with caution before overturning *reasons* given by Congress for doing something different in the military than in civilian life. The difficulty here is that respondent has been unable to cite any justification offered by Congress for the absence of *any* term of office, and even its brief contains none.

In fact, there is no evidence that Congress ever gave this issue a moment's attention in 1968 or at any other time when it legislated with respect to judicial appointments in the military. There is not a word in the UCMJ that addresses this issue specifically, nor is there any indication in the legislative history that Congress considered, and then rejected, the idea of fixed terms for military judges. After 1968 the issue came before Congress only when a Defense Department commission issued a report on the issue, but Congress simply did nothing in response to it (US Br. 30-32), a decision equally consistent with any number of alternatives besides Congressional approval. *See Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting). Accordingly, the deference argument fails both because there is no indication that Congress considered the term of office issue in creating the office of military judge in 1968, and because there is no explanation by Congress or the Executive Branch of *why* relatively short fixed terms of office are incompatible with the legitimate

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[6](...continued)
served as a "presiding officer" at a military court-martial (US Br. 34).

needs of the military.[7]

There is another aspect of petitioners' Due Process argument that respondent has also largely side-stepped. As explained in Point III of our opening brief, the Due Process violation results not simply from the absence of a term of office for military judges, but also from the fact that the power of removal is lodged in the Judge Advocate General of their service, rather than in a high ranking civilian. As the person responsible for his service's military justice system, including the prosecutors of those accused of violating the UCMJ, the Judge Advocate General has a special interest in the outcome of courts-martial that is not shared by other senior military officials. In addition, his proximity to the military justice system, unlike other senior officials who have many other responsibilities, means that he is more likely to hear complaints about military judges and to respond to them than the Secretary of the Navy or the President would be if only they had the power to remove military judges. In other words, while the largely

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[7]If Congress had actually considered the issue, and decided upon a fixed term of office, it *would* be entitled to deference with respect to the period of time chosen, both because the fixing of a period would necessitate consideration of other periods, and because Congress would inevitably have to balance the various factors deemed relevant in making that judgment. If our position is sustained on this issue, it will be up to Congress to make that judgment in the first instance, and given the deference to which that judgment would be entitled, the difficulties suggested by respondent (US Br. 30) would not arise. We also cannot let pass the government's suggestion (Br. 31-32) that the addition of UCMJ Art. 6a, 10 U.S.C. § 806a, in 1989, was the result of the work of the 1984 Commission that considered the lack of tenure for military judges and that somehow Art. 6a was the compromise. That provision was enacted in response to the decision in *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988), and not the Commission's efforts.

unencumbered power of removal is a Due Process violation on its own, the fact that the power is vested in the Judge Advocate General of each service vastly compounds the problem. Thus, even if there might be some reason not to have fixed terms of judicial office -- a proposition that we reject -- there would still be no justification for reposing in the Judge Advocate General the responsibility for assigning and reassigning military judges. And while, as respondent points out (Br. 45), military judges have to be accountable to *someone*, that does not explain why that person must be the Judge Advocate General, or why accountability must include the power to transfer without cause. Accordingly, both because of the possibility of early removal from a position as a military judge, and because of the identity of the person who can do the removing, petitioners' rights were violated when they were not tried and their appeals were not heard by judges with the independence that Due Process requires.[8]

III. THE *DE FACTO* OFFICER DOCTRINE IS INAPPLICABLE TO THIS CASE.

In order to fill most governmental positions, federal or state, a series of requirements must be met, some constitutional and some statutory. From time to time, mistakes may be made, such that, when a governmental decision is challenged, the objecting party may argue that the

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[8]Although respondent characterizes petitioners' Due Process claim as one of "implied bias," US Br. 39, our claim is based on a lack of independence, not an absence of impartiality. Neither Article III, nor the statutes cited on pages 27-28 of our opening brief, nor the cases cited on pages 36-37, are principally concerned with bias, in the sense of lack of objectivity. Rather, they are all concerned with assuring that the possibility of removal does not hang over the heads of the decisionmaker like a Sword of Damocles, as was found to be the case in *Bowsher v. Synar*, 478 U.S. 714 (1986), *Wiener v. United States*, 357 U.S. 349 (1958), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

person making the decision did not properly hold the necessary office and hence the decision is void. The *de facto* officer doctrine was developed to limit the circumstances in which government actions can be challenged by questioning the title of the officeholder. The principal harm that the doctrine was intended to prevent arises when the attack occurs long after the appointment is made, and the defect is of a technical nature that could have and would have been readily cured had it been called to the government's attention in a timely fashion. The doctrine is not a simple one, as the discussion of the Court of Appeals for the District of Columbia Circuit in *Andrade v. Lauer*, 729 F.2d 1475, 1496-1500 (1984), makes clear. But whatever its reach, no case has applied the doctrine in circumstances remotely resembling those presented here.

We begin with the cases cited on pages 22-24 of respondent's brief, on which it bases its claim that the doctrine prevents this Court from applying the Appointments Clause -- but not the Due Process Clause -- to overturn petitioners' convictions. Most of those cases are civil, not criminal, and the only criminal cases involve collateral attacks on state criminal convictions in federal court. *See United States ex rel. Doss v. Lindsley*, 148 F.2d 22 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945); *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir.), *cert. denied*, 375 U.S. 17 (1963); *see also Ex parte Ward*, 173 U.S. 452, 454 (1899) (doctrine used in criminal case to defeat collateral attack on validity of judge's title to office).

The inapplicability of the doctrine to this case can be seen most easily by examining those cases in which it was *not* applied, but where the doctrine would have provided an easy way to dispose of the case had it been relevant. Thus, in *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991), this Court could have avoided deciding the very difficult question whether the Tax Court was a Court of Law or a Department under the Appointments Clause since the special trial judges there were clearly at least *de facto* officers. Similarly, in

Morrison v. Olson, 487 U.S. 654 (1988), the difficult determination of the constitutionality of the independent counsel would have been unnecessary since, if the doctrine has any utility at all in the criminal context, it surely would have sufficed to have allowed the independent counsel to enforce a grand jury subpoena, which was the specific action challenged there. And, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), which involved both civil and criminal cases, if the *de facto* officer doctrine were available, Justice Harlan would have been able to do what "we find ourselves unable to do," which was "to decide these cases on narrower grounds if any are fairly available." *Id.* at 534. Finally, in *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986), the court of appeals divided 7-4 in a direct criminal appeal, before upholding a recess appointment of a district judge in the face of a claim that the appointment was inconsistent with Article III, yet none of the judges even mentioned the *de facto* officer doctrine.

It is possible that all of the Justices, judges, and counsel defending the statutes, including various Solicitors General, in all of these and other cases, such as *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), simply overlooked the *de facto* officer doctrine, but we doubt it. In our view the failure to mention the doctrine in any of those cases is best explained by its lack of relevance either to a direct attack on a statutory scheme or, as here, when a judge or prosecutor directly involved in a criminal case has allegedly been appointed in violation of the Constitution.

It would be particularly harsh to apply the doctrine in a criminal case involving a structural defect of constitutional dimensions, since almost no one could challenge the practice before being adversely affected by some act of that officer. *See City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981). Indeed, if the doctrine were relevant in these kinds of cases, it would always be the first (and last) question asked,

precluding any ruling on the merits of a constitutional claim because to do otherwise would be to render an advisory opinion. Stated another way, the kind of indiscriminate use of the *de facto* officer doctrine proposed by respondent here, and by the Court of Military Appeals in *Carpenter*, *supra*, would effectively insulate all such claims from judicial review and thereby allow Congress or the Executive to violate even the most explicit prohibitions in the constitution with impunity, knowing that the *de facto* officer doctrine would always prevent a court from setting aside the challenged action.

The only federal criminal case of which we are aware, in which the doctrine was relied on to sustain a conviction on a direct appeal, is *McDowell v. United States*, 159 U.S. 596 (1895). Not only was the doctrine an alternative basis for affirming a conviction, but the facts of *McDowell* are so different from this case as to sap it of all precedential value here. The defect alleged in *McDowell* was that the procedures had not been followed in arranging for an assignment of a duly appointed federal judge from one district to sit in another district. The judge had not presided over the defendant's trial, nor was he present when the grand jury had returned the indictment. Rather, the only defect was that he was presiding when the grand jury was first sworn and impaneled, and even then a properly appointed judge may have re-sworn the grand jurors before the indictment was handed down. Under those circumstances, this Court refused to overturn defendant's conviction for what was at most a highly technical violation of a statute, whose purpose had nothing to do with protecting the rights of defendants or allocating power within the government. And the fact that *McDowell* was cited in *Glidden*, 370 U.S. at 535-36, albeit for a different proposition, makes any claim that the *de facto* officer doctrine was overlooked in *Glidden* even more improbable.

In the final paragraph of this portion of its brief, respondent also urges that, if the Court rules in petitioners'

favor, it should "stay the effectiveness of its ruling for a reasonable period of time" as it has done in other cases, such as *Bowsher, Northern Pipeline*, and *Buckley*. US Br. 24. But all of those cases were civil actions in which the equitable power of the courts could be used to ameliorate the situation until corrections could be made in the laws, whereas this is a criminal case in which petitioners have been severely punished as a result of decisions made by persons who have been appointed in violation of an explicit provision of the Constitution. *See Andrade v. Lauer*, *supra*, 729 F.2d at 1499 n.39. To accept the government's invitation here would reintroduce through the backdoor the concept of prospective rulings in criminal cases that this Court has squarely rejected in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Finally, the government has claimed that a ruling in petitioners' favor "would have a devastating effect on the operation of the military justice system," US Br. 7, but a number of factors suggest that such forecasts may be based more on the desire to gain tactical advantage than on reality. To be sure, under *Griffith*, the rulings in this case would be applied to all cases now pending on direct appeal "in which the issue has been preserved." US Br. 7. However, because almost everyone convicted of a crime in the military begins serving their sentence immediately, and because many of the periods of confinement imposed are fairly short, many of those affected by the ruling in this case will have already completed serving their sentences by the time that this case is decided. Moreover, for those whose principal interest in continuing their appeal is to remove the stigma of a bad conduct or dishonorable discharge, the Naval Military Personnel Manual ¶ 3420260.6d authorizes administrative discharges, an approach that strikes a reasonable balance in many of these cases and avoids the kind of disruption that the government predicts. *See also* Marine Corps Separation and Retirement Manual ¶ 6203.4 (same).

There is another possible basis for limiting the effect

of this Court's ruling, which the government itself has suggested: the arguable necessity of preserving these objections. Counsel of record is extremely reluctant even to suggest how this argument might apply because he represents only these two petitioners on these claims, and there are individuals who have raised one or both of these claims at various stages of their cases. Their rights surely should not be adjudicated in this proceeding, where they are not represented by their own counsel and where the facts and circumstances of their cases, not to mention their own legal analyses, cannot be advanced by present counsel. Most important of all, these arguments should not be considered in the first instance by this Court, but by the lower military courts, which have the relevant records and the expertise on these issues, and which can hear argument from counsel for the individual defendants.

For these reasons, there is no basis to conclude that the government's apocalyptic fears will materialize, although we anticipate that a ruling in petitioners' favor on either issue will have substantial effects on the military justice system. But if the Constitution has been violated, those who were tried and sentenced under an unconstitutional system have a right to have the courts correct those violations. The military justice system simply cannot disregard the constitutional rights of those charged with crimes under the UCMJ because some defendants may have to be retried or resentenced, or their appeals reargued. The Constitution requires no less.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Military Appeals should be set aside, and the cases remanded for further proceedings consistent with this Court's decision, with directions that the Court of Military Appeals not apply the *de facto* officer doctrine.

Respectfully submitted,

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SEPTEMBER 1993

No. 92-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ERIC J. WEISS & ERNESTO HERNANDEZ,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The United States Air Force Appellate Defense Division's interest lies in the fact that the decision of this case can potentially reach virtually every United States Air Force court-martial. As counsel for every Air Force member convicted at court-martial and sentenced to death, one year or more of confinement, or a punitive discharge, the United States Air Force Appellate Defense Division is compelled to submit this filing. Given our unique expertise in military law, we herein endeavor to provide the Court with a history of the development of the positions of military trial and appellate judges.

ARGUMENT

THE COURT OF MILITARY APPEALS WRONGLY APPLIED MILITARY HISTORY AND ERRED BY LIMITING ITS ANALYSIS TO MILITARY HISTORY WHEN DECIDING WHETHER OR NOT DUE PROCESS REQUIRES MILITARY TRIAL AND APPELLATE JUDGE'S TO HAVE THE PROTECTION OF FIXED TERMS OF OFFICE.

A. Anglo-American Legal Tradition Requires Fixed Judicial Terms of Office for Trial and Appellate Judges.

Historical development of military justice in the United States Armed Forces. Congress created the offices of military judge and appellate military judge in the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This Act was the culmination of "a gradual expansion of judicial authority" that began about 1920. Homer E. Moyer, Jr., *Justice and the Military* (1972), § 2-620, at 534. Prior to the implementation of the Uniform Code of Military Justice (UCMJ) in 1951, the various branches of the military had different criminal justice arrangements. The Army and, later, the Air Force were governed by the Articles of War while the Navy and Marine Corps were governed by the Articles for the Government of the Navy. Yet another statute governed the Coast Guard and its predecessors, the Revenue Cutter Service and the Life Saving Service. *See generally* Moyer, *supra,* §§ 1-111 to -116, at 8-9. The development of military justice under the Army and Navy will be discussed separately below.

The pre-UCMJ Navy. "American courts-martial in the 19th century had no judges," 1 Francis A. Gilligan & Fredric I. Lederer, *Court Martial Procedure* (1991), § 14-10.00, at 514 & n.2. Under the Articles for the Government of the Navy, there was no "judicial or even quasi-judicial officer. The exercise of judicial authority in the Navy was vested in the court as a whole." Henry

A. Cretella & Norman B. Lynch, *The Military Judge: Military or Judge?,* 9 Cal. W. L. Rev. 57, 70 (1972). There was no law member of the court, Robert S. Pasley & Felix E. Larkin, *The Navy Court-Martial: Proposals for Its Reform,* 33 Cornell L. Rev. 195, 208 (1974), but rather a functionary known as the judge advocate, whose duty was to prosecute and to advise the court. Cretella & Lynch, *supra,* at 66 & nn.66-68. For appellate review, the Navy relied on a board of review that had no statutory basis. Its recommendations were not binding. Pasley & Larkin, *supra,* at 223.

The pre-UCMJ Army. Nineteenth century Army courts-martial also had a judge advocate. The judge advocate wore numerous hats. He was not a judge, and to the limited extent his role even resembled that of a judge, his power was solely advisory. In 1920, the Articles of War were amended to require that a "law member" be detailed to sit as a member on any general court-martial. National Defense Act of 1920, 41 Stat. 759, 787-812. If a member of the Judge Advocate General's Department was available, he had to be so detailed. If no member of the Judge Advocate General's Department was available, then a specially trained member of another branch of the Army had to be detailed. The law member "was not a judical officer, but merely an 'evidentiary referee.'" Cretella & Lynch, *supra,* at 69. As explained in the Army's official summary of the evolution of the military judge's role and powers:

> The law member was a voting member of the courts. His vote was equal to that of other members, and he participated fully in all closed, deliberative sessions, His legal powers were generally only advisory. He ruled initially on all interlocutory questions except challenges, but other court members could object to and overrule his determination by vote. He ruled finally on the admissibility of evidence, but the statute defined "admissibility" very narrowly.

Department of the Army, *Legal Services: Trial Procedure* § 3-2a (Apr. 20, 1990) (DA Pam. 27-173) (foot-

notes omitted). In 1948, the so-called Elston Act, Selective Service Act of 1948, Title II, 62 Stat. 604, 627-44, modified this arrangement by requiring that the law member be an attorney certified by the Judge Advocate General. *Legal Services: Trial Procedure, supra,* § 3-2b.

> The law member still participated in the court's closed sessions. With three exceptions, however, his rulings on interlocutory questions became final. The three exceptions were challenges, motions for a finding of not guilty, and questions concerning the accused's sanity.

Id. (footnotes omitted).

Until 1920, appellate review was performed by departmental officials on an administrative basis. In that year, as a result of widespread dissatisfaction with the administration of military justice during World War I, including revulsion over the hasty execution of death sentences imposed on a group of 13 black soldiers in 1917, Congress created a board of review. *See generally* 1 Johnathan Lurie, *Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775-1950* 69-70 (1992); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell,* 35 Mil. L. Rev. 1, 3-4 (1967). That board was the predecessor of the boards of review established by the UCMJ.

Evolution under the UCMJ. The UCMJ superceded the Articles of War, the Articles for the Government of the Navy and the Disciplinary Laws of the Coast Guard. It created an official known as the law officer, who had to be assigned to any general court-martial, and was required to be a lawyer. Unlike the Army's former law member, the law officer was not a voting member of the jury. "A review of the legislative history of the UCMJ . . . leads to the conclusion that the question as to whether Congress intended to create a judge, or merely to remove the law officer from membership on the court, can-

not be definitively answered." Cretella & Lynch, *supra,* at 79; *see also* Robert E. Miller, *Who Made the Law Officer a "Federal Judge"?,* 4 Mil. L. Rev. 39 (1959). Nonetheless, over the years, as a result of provisions of the *Manual for Courts-Martial* and a series of decisions of the Court of Military Appeals, the law officer became more and more of a judicial officer. Moyer, *supra,* § 2-620, at 535.

Even though the UCMJ applies to all of the services, the Navy and Army did not hold the same view of the law officer. Thus, the Army

> took additional steps to improve the law officer's status. First, [it] established the Law Officer Program in 1958. Under the program, law officers were required to be qualified judge advocates, normally on a 3-year tour of duty. The law officers became members of the Field Judiciary under The Judge Advocate General's direct control. In turn, the Judiciary assigned its members to duty stations within judicial circuits. Although the law officer might be assigned to a convening authority's station, the law officer was not a member of the convening authority's command; and neither the convening officer nor his staff judge advocate supervised the law officer's performance of his official duties.

Legal Services: Trial Procedure, supra, § 3-2c (footnotes omitted), *citing, inter alia,* Meagher & Mummey, *Judges in Uniform: An Independent Judiciary,* 44 J. Am. Jud. Soc'y 46 (1960); Frederick Bernays Wiener, *The Army's Field Judiciary System: A Notable Advance,* 46 A.B.A.J. 1178 (1960).

In 1962, the Field Judiciary was redesignated as the United States Army Judiciary and the law offices were removed from the direct control of the Judge Advocate General. *Legal Services: Trial Procedure, supra,* § 3-2c (footnote omitted). The Navy and Marine Corps created a judicial structure similar to the Army's in 1962, after a brief pilot program. Moyer, *supra,* § 2-620, at 536.

The Military Justice Act of 1968. In 1968, Congress transformed the law officer into the military judge and provided that a military judge would be used in every general court-martial. "The creation of the office of military judge was not simply a name change; important new duties and responsibilities were placed upon the military judge." Stanley T. Fuger, *Military Justice, Variation on a Theme,* 66 Conn. B.J. 197, 201 (1992). Military judges were barred from participating in the members' closed sessions. On questions of law, their rulings became final. In addition, except for capital cases, bench trials were now permitted. The 1968 changes "vested in the presiding judicial official the additional authority necessary for him to emerge as 'judge,'" Cretella & Lynch, *supra,* at 87, and created a true judge. 1 Gilligan & Lederer, *supra,* § 14-10.00, at 516. The provision allowing bench trials "appeared to remove any doubt that the military judge exercises true judicial authority." Stevenson, *The Inherent Authority of the Military Judge,* 17 A.F.L. Rev. 1, 5 (1975).

Historical Development of British Military Justice. The connection between judicial independence and protected tenure, life or otherwise, is at the heart of the Anglo-American legal tradition. *E.g.,* Henry J. Abraham, *The Judicial Process* 41 (5th ed. 1986); Shimon Shetreet, *Judges on Trial: A Study of the Appointment of the English Judiciary* 270 (1976).

In England, the connection between judicial independence and security in office is manifest in the path which leads from Coke's dismissal in 1616, through the achievement of service during good behavior rather than at the pleasure of the throne in § 7 of the Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701), to the abrogation in 1760 of the rule that judicial patents had to be reissued upon the death of the monarch. Sir John Sainty, *The Judges of England 1272-1990* 4 & n.11 (1993) (Selden Society Supp. Series vol. 10), *citing* 1 Geo. 3, ch. 23, § 1; *see generally* Theodore F.T. Plucknett, *Taswell-Langmead's*

English Constitutional History 460-66 & n.51 (11th ed. 1960), *citing* 10 William S. Holdsworth, *History of English Law* 415 n.10 (1938).

Except for the Lord Chancellor, who is a member of the Government, judges of the English superior courts have long enjoyed life tenure during good behavior. *See generally* Sainty, *supra,* at 4, 20, 43, 57-58, 90, 105, 137, 143-44, 157, 163, 181, 187, 229; Supreme Court Act, 1981, § 11(3) (Eng.); Appellate Jurisdiction Act, 1876, 39 & 40 Vict., ch. 59, § 6. Circuit judges are appointed to serve through age 72 subject to removal for incapacity or misbehavior. Court Act, 1971, §§ 17(1), (4) (Eng.). Recorders are appointed for specified terms of office, extendable for stated periods and terminable for cause. *Id.* §§ 21(1), (4). The Courts-Martial Appeal Court was established by Parliament in 1951. Courts-Martial (Appeals) Act, 1951, 14 & 15 Geo. 6, ch. 46. It consists of judges drawn from various British courts and other persons who are appointed for "such term as may be determined by the Lord Chancellor" prior to appointment. Courts-Martial Appeals Act, 1968, ch. 20, § 2 (Eng.).

Congress and fixed terms of office. Where not constrained by Article III, Congress also has overwhelmingly favored fixed terms rather than at-pleasure judicial appointments. Under the Northwest Ordinance, which Congress ratified after the Constitution took effect, 1 Stat. 51 n.(a), the commissions of the three judges of the territorial court were "to continue in force during good behavior." Over time, the territorial model changed to appointments for terms of years. Presidents could and did remove territorial judges, *e.g., McAllister v. United States,* 141 U.S. 174, 185 (1891),[1] but the judges were at least afforded fixed terms.

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[1] Justice Field, dissenting with Justices Gray and Brown, wrote:

> The idea essentially appertaining to and involved in the judicial office is that its exercise must be free from restraint,

Territorial judges are now appointed for fixed terms subject only to removal by the President for cause. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 878 n.138 (1990); 48 U.S.C. §§ 1424(b) (1988) (D. Guam), 1614(a) (D.V.I.), 1694(b) (D.N.M.I.) From the perspective of the potential chilling effect on judicial independence, there is a substantial difference between a judge who serves under those conditions and one who serves without even a nominal term. The difficulty of securing presidential assent to a removal and the danger of adverse publicity and political fallout from such an act serve as checks on the exercise of the removal power. These safeguards do not exist when removal is effected by facially routine, low-visibility military personnel actions such as orders to a new duty assignment. This aspect of the lack of fixed terms is particularly aggravated by the fact that military trial and appellate judges are not appointed by the President with the advice and consent on the Senate.

A recent and ironic illustration of Congress's recognition of the link between fixed terms and judicial inde-

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without apprehension of removal or suspension or other punishment for the honest and fearless discharge of its functions within the sphere of the jurisdiction assigned to it. No one, in my judgment, under our system of law, can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at the pleasure and will of another. No such doctrine has been maintained in England since the [Act of Setlement], "for the further limitation of the crown and better securing of the rights and liberties of the subject," passed in 1700, one of the great Acts which followed the revolution of 1688.

141 U.S. at 193-94.

The power to control judicial tenure "exerted a most baleful influence upon the administration of justice, destructive of private rights and subversive of the liberties of the subject." *Id.*; *cf.* William H. Rehnquist, *Why a Bill of Rights is Not Enough*, 15 Wilson Q. 111, 113 (1992) (noting power of French Convention to add and remove judges and jurors at pleasure; "[i]t would be difficult to imagine a formula more certain to produce despotism").

pendence involves the Court of Military Appeals itself. In 1992, Congress for the first time provided that the chief judge of that court would serve as such for five years, *see* National Defense Authorization Act of Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315; UCMJ Art. 143(a)(3)-(4), 10 U.S.C.A. § 943(a)(3)-(4) (West. Supp. 1993), in contrast to earlier practice under which the position was freely transferable by the President. The legislative history cites increased judicial independence as one of the purposes of the change. S. Rep. No. 102-352, 102d Cong., 2d Sess. 278 (1992); H. Conf. Rep. No. 102-966, 102d Cong., 2d Sess. 758 (1992).

International law and fixed terms of office. Finally, the connection between fixed terms and judicial independence is reflected in international norms. *The Basic Principles on the Independence of the Judiciary*, reproduced in *Centre for the Independence of Judges and Lawyers Bull.* Nos. 25-26, 14-21 (Apr.-Oct. 1990), and Lawyers Committee for Human Rights, *In Defense of Rights: Attacks on Lawyers and Judges in 1991* 175-78 (1992), were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and later endorsed by The General Assembly. They provide that "[t]erms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age, or the expiry of their term of office, where such exists."

The Court of Military Appeals and fixed terms of office. Notwithstanding the widespread recognition that fixed terms are essential to judicial independence, the Court of Military Appeals reasoned that at-will judges are not required for the military because American and British military justice historically did not give judges fixed terms of office. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). This approach is mistaken because the

analysis of legal tradition in due process cases arising under the UCMJ is not properly confined to *military* legal tradition. Rather, it extends to the broader legal traditions of our society. It was therefore circular (assuming *Medina v. California*, 112 S. Ct. 2572 (1992), has any application to Fifth Amendment due process) for the court below to confine its analysis of what legal tradition deems fundamental to the narrow field of military justice. Such a limited focus avoids the very kind of inquiry *Medina* contemplates, just as if a state were allowed to argue that a particular safeguard was not required by Fourteenth Amendment due process because that state had itself never afforded it to criminal defendants.

An example of the correct procedure is found in *Herrera v. Collins*, 113 S. Ct. 853 (1993). There the Court was called upon to determine the application of due process to Texas's new trial practice. In doing so, it went far beyond that one state's new trial jurisprudence, surveying English, colonial, early and current state practice, early federal legislation, and the evolution of Fed. R. Crim. P. 33. *Id.* at 864-66. The Court of Military Appeals failed to perform this kind of broad, multi-jurisdictional inquiry either in this case or in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992) on which it relied. Had it done so, it would have had to conclude that fixed terms of judicial office are overwhelmingly deemed a required element of criminal justice. *Herrera* is also noteworthy because the Court correctly found the states' present practices too divergent to count for much in the due process equation. In sharp contrast, as far as we can determine, no state uses at-will judges in felony cases.

But even if we have misread *Herrera* and *Medina*, the Court of Militarly Appeals single-minded reliance on past military justice practice was mistaken for the simple reason that, as discussed above, the office of military judge has not existed for centuries. Thus, no long tradition supports the armed services' practice of having their judges

serve on an at-will basis because there is no long tradition of military judges at all.

The leading 19th and 20th Century treatise on military law pointed out that "the judge advocate in our procedure [is] *neither a judge*, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the Court, and a recorder" (emphasis added). William Winthrop, *Military Law and Precedents*, 179 (2 ed. 1920). The advisory functions served by the judge advocate were a far cry from the decisive power expected to be exercised by federal and state judge and, at least since 1968, by military judges and Court of Military Review judges. Because the judge advocate of olden days was no more a judge than the Solicitor General is a general, the history cited by the government in opposing certiorari and by the court below is of limited value in determining what due process requires.

British military justice is of limited value when resolving due process concerns. British military legal tradition is of limited value to the case at bar because Britain did not historically have a military bench. At present, her Army and Air Force courts-martial include a judge advocate who functions much like the law officer formerly used in American courts-martial. The court receives its legal advice from a judge advocate who is a civilian barrister serving on the staff of the Judge Advocate General by appointment of the Lord Chancellor. J.K. Venn, *Military Justice—An Oxymoron?*, 141 N.L.J. 524 (1991). These officials also sit as magistrates in the Standing Civilian Courts which Parliament has created to try civilians or dependents attached to the British forces abroad. Armed Forces Act, 1976, § 6(4) (Eng.). Assistant and deputy Judge Advocates General are appointed by the Lord Chancellor and are removable only for "inability or misbehaviour." Courts-Martial (Appeals) Act, 1951, § 32(1). The Judge Advocate General may also employ temporary assistants. *Id.* § 30(2). They "hold and va-

cate office in accordance with the terms of [their] appointment," *id.* § 32(3), and we are advised by the Ministry of Defense that in fact such appointments are for fixed periods.

In summary, the connection between judicial terms of office and substantive fairness is one that the Anglo-American legal tradition, consistent federal and state practice and international norms combine to place beyond the pale of reasonable debate.

B. The Substitute Protections Relied On By the Court of Military Appeals as a Basis for Holding That Fixed Terms of Office Are Not Required Are Illusory.

The Court of Military Appeals has invoked other procedural safeguards as a substitute for fixed terms. *Graf*, 35 M.J. at 463. These protections are illusory and not an efficacious substitute for fixed terms. They did not protect petitioners' right to an independent bench at trial and on appeal.

In the military justice system, transfer from judicial duties is the functional equivalent of removal. The removal power renders the removable official subservient to the holder of the power. *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986). "The implicit and omnipresent threat that a . . . judge can be removed immediately without cause hangs like a sword of Damocles above his bench as he rules on cases." *People v. Horan*, 556 P.2d 1217, 1221 (Colo. 1976) (en banc), cert. denied, 431 U.S. 966 (1977) (Carrigan, J., dissenting). Such a sword hangs over the heads of military judges in every case.

The UCMJ does not adequately insulate judges from potential pressure. For example, a 1984 study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory*

Commission Report 365 (1984) (table 1).[2] Substantial proportions of those involved in the administration of military justice believe that guaranteed terms would create a more independent and fairer military judiciary. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 406 (45% of convening authorities), 505 (50% of staff judge advocates), 618 (56% of military judges), 737 (47% of Court of Military Review judges), 836 (60% of trial counsel (prosecutors), 951 (78% of defense counsel) (1984).

The court below claimed in *Graf*, that "decisions of this [c]ourt, *including today's*, . . . prohibit adverse removal action" on the basis of dissatisfaction with a judge's judicial actions. *Graf*, 35 M.J. at 466 (emphasis added). The implication that prior decisions so held is false. Neither of the cases the court cited stands for the quoted proposition. Indeed, in *In re Taylor*, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961) and *In re Taylor*, 13 M.J. 204 (C.M.A. 1982) (mem.), the court twice declined to entertain a request by a "law officer," for review of a decision to remove his certification. The leading treatise on military justice correctly reported in 1991:

> There appear to be . . . no restrictions at all on denying "reappointment" (*e.g.*, reassignment as a judge)

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[2] If anything, these data understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." 2 *id.* 1374. A growing list of cases has highlighted the vulnerability of the military bench to undue and improper influence. *E.g., United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1473 (1992); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); *see generally* Joseph H. Baum & Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, 36 Fed. B. News & J. 242 (1989); *see also United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976).

> to a military judge whose conduct is considered unsatisfactory. Thus, although neither command channels nor the Judge Advocate General may complain to a judge about findings or sentence, the lack of tenure permits reassignment of the judge for those very reasons. Further, as all assignments are made pursuant to "the needs of the service," it is by no means clear that a judge could not lawfully be reassigned out of the judiciary because of dissatisfaction with his or her results.

1 Gilligan & Lederer, *supra*, § 14-80.00, at 555.

Thus, whatever the effect of the alternative protections relied on by *Graf*, there was, at the time *these* cases were tried, no authority for the proposition that retaliatory transfers were illegal. Nothing protected the judges who presided at petitioners' trials and Court of Military Review appeals from the chilling effect of their lack of fixed terms and exposure to reassignment out of the judiciary. The Court of Military Appeals candidly admitted that it was announcing a new rule. *Graf*, 35 M.J. at 463. However inadequate that rule is, petitioners are at least entitled to its benefit. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The *Graf* court claimed that its conclusion was confirmed by the enactment of Article 6a of the Code, 10 U.S.C.A. § 806a (West. Supp. 1993), *Graf*, 35 M.J. at 465, but that provision, too, was no help to petitioner Weiss because it was enacted months *after* his trial. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1303, 103 Stat. 1576. What is more, Article 6a has nothing to do with the power to reassign. Rather, it deals with "the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." Congress put such a structure into place so that the Court of Military Appeals would not have to make up the rules as it goes along, as it did in *United States Navy-Marine Corps*

Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988). But nothing in this recent measure addresses the concern underlying the cases at bar. The armed services retain the power to reassign military judges, and may do so in preference to going through the procedures for suspension or decertification for cause. Neither Article 6a nor its implementing regulations confers on the judge the right to demand a hearing on the theory that a transfer was retaliatory.

Even if, at the time of petitioners' trials and intermediate appeals, the law had been as the *Graf* court later declared it to be, the alternative remedies it cited would not excuse the lack of fixed terms. Article 98(1) of the UCMJ, 10 U.S.C. § 898(1) (1988), makes it a crime to "knowingly and intentionally fail[] to enforce or comply with any provision of [the Code] regulating the proceedings before, during, or after trial." This affords no protection against the chilling effect of a lack of fixed terms. It has been aptly described as a "dead letter." *Moyer*, *supra*, § 3-361, at 780. In nearly 40 years, there have been, at most, two prosecutions under it. *Compare id.* (one case, in 1953) *with* 1 Gilligan & Lederer, *supra*, § 17-43.00, at 639 (two cases, neither of which resulted in a sentence serious enough to occasion a reported decision). "In theory, persons who violate the article 37 proscriptions against command influence may be prosecuted under article 98; in practice, that notion is ludicrous." Moyer, *supra*, at 779.

The alternative remedies are also no answer to petitioners' due process claim because they rely on the military judge (who may well not wish to "rock the boat") to lodge a complaint if he or she is subjected to a transfer from judicial duties. *See id.* at 780 (noting futility of expecting command influence victim to prefer charges). The judge will typically have no evidence that the transfer was retaliatory, yet the burden would be on him to prove retaliation. Hard evidence will rarely if ever be avail-

able, much less will there be proof that the action was done knowingly and intentionally, as Article 98(1) requires. "Smoking guns" are unlikely to appear where transfers can easily be palmed off as routine or dictated by the "needs of the service."

Whether relief is sought under Article 138, 10 U.S.C. § 938 (1988), or by application to the board for correction of military or naval records, 10 U.S.C.A. § 1552 (West Supp. 1993), the judge will have no right to discovery. Worse yet, Article 138 complaints and record-correction proceedings are conducted out of the public eye. The consequence is that, on top of all else, the accused might well be the last person to learn about a matter directly affecting his or her right to an independent judge.

The *Graf* court's alternative suggestion that, if all else fails, a judge who is threatened with a retaliatory transfer may seek an extraordinary writ, *Graf*, 35 M.J. at 463, is no more comforting to an accused. Passing over the substantial question as to whether such a writ would be in aid of the court's jurisdiction, as required by the All Writs Act, 28 U.S.C. § 1651(a) (1988), the judge would have to file within 20 days of learning of the action complained of, C.M.A.R. 19(d), and would still have no right to discovery. Obviously, filing an extraordinary writ against one's military superior would be public, but that very circumstance suggests that only the most courageous military judge would invoke this remedy.

> As desirable as moral courage may be, . . . the presupposition that there should be adverse consequences to oneself for doing what one ought to do suggests that something is wrong. The administrative framework in which the military judiciaries operate should promote judicial independence affirmatively, not by taxing the moral courage of the judges to compensate for adverse structural conditions, which, by their very existence, create a perception of judicial self-interest in the outcome of decisions among the judges themselves, accused, and members of the public.

United States v. Mitchell, — M.J. —, — (N.M.C.M.R. (1993) (en banc) (Freyer, Sr. J., concurring).

In addition to being unrealistic, the remedies cited in *Graf* are unworkable. If, by some miracle, a judge *were* able to prove that a retaliatory transfer had occurred, a mat[illegible]s nest of problems would ensue in trying to determine which prior cases might have been infected. This difficulty is further complicated because the chilling effect of a retaliatory transfer might well be felt not only by *that* judge, but by *other* judges who learn of it. The Department of Defense's 1984 study demonstrates that military judges do hear about it when their brethren and sisters are threatened with transfer or actually transferred as a result of their decision making. *See*, 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). In this respect at least it is true, as the Court of Military Appeals has recognized, that "[w]ord travels fact in the military." *United States v. Levite*, 25 M.J. 334, 339 (C.M.A. 1987). And which of the cases the other judges presided over would have to be set aside? Ultimately, the problem is not so much the judge who has been transferred, but the judge who *fears* transfer.[3]

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[3] When, in 1616, Montagu was installed as Coke's successor as Chief Justice of the Court of King's Bench, Lord Chancellor Ellesmere pointedly noted that the vacancy being filled was caused not by some normal evolution but by the dismissal of an incumbent, referring to the circumstances as "a Lesson to be learned of all, and to be rememb[e]red *and feared* of all that sit in Judicial places." 72 Eng. Rep. 931 (No. 1114) (emphasis added); *see* Fidell, *Military Judges and Military Justice: The Path to Judicial Independence*, 74 Judicature 14 & n.3 (1990). Montagu got the point. While boasting that he would be courageous, he also assured Ellesmere that, among other things, he would not be "a heady Judge." 72 Eng. Rep. 932, 933 (No. 1115).

Petitioners are far from alone in questioning the efficacy of the alternative protections relied on by the Court of Military Appeals. The very day certiorari was granted, the Navy-Marine Corps Court itself recognized in *Mitchell*, —— M.J. ——, the "severe limitations" on redress for military judges through the usual means. The case concerned the threat to judicial independence from the fact that the judges of that court receive fitness reports drafted by an Assistant Judge Advocate General whose job includes supervision of the appellate prosecutors. While ultimately ruling against Mitchell, Chief Judge Larson observed that the ability of a superior to exact retribution through the "subtle shading" of a fitness report "may not provide a sufficient basis for relief through" methods such as those relied on in *Graf*. *Mitchell*, —— M.J. at ——. As a result, the court "place[d] little reliance on these means of redress as a safety net against the improper use of a fitness report. . . ." *Id.* Senior Judge Freyer, concurring, properly faulted the dispositions in *Mitchell*, —— M.J. ——, *Mabe*, 33 M.J. 200, and *Graf*, 35 M.J. 450, on the ground that they are

> *almost wholly lacking in any practical mechanism for preventing, detecting, or remedying violations.* Unless a reporting senior is clumsy enough to insert objectively prohibited comments in the narrative section of a fitness report, the report can be made virtually inscrutable. *The Board for Correction of Military Naval Records and Article 138 are useless in such cases . . . .*

—— M.J. at —— (emphases added); *see also id.* at —— (Reed, J., concurring in the result). Having thus acknowlged the practical unavailabiility of meaningful redress to judges in the context of the fitness report system, the *Mitchell* court was compelled to rely instead on the notion

> that the JAG's best interest lies in preserving, not undermining, judicial independence and on the presumptions that the JAG will recognize and faithfully execute his duty to preserve our independence and that the judges of this Court will have the integrity and moral courage to steadfastly resist any attempt at undermining that independence.

—— M.J. at ——. This claim—which dramatically illustrates how the Appointments Clause violation exacerbates the due process violation—is not enough. As Judge Reed, concurring in the result, cautioned, "*generally* the JAG's best interest lies in preserving judicial independence. At times, however, the JAG's and the military leadership's concerns may be contrary to those of the Court [of Military Review]. . . . At times, these concerns are in direct conflict. . . ."

Id. at —— (emphasis in original, citations omitted). In a similar vein, a former judge of the Air Force Court of Military Review has written:

> The claim that the system works "well enough" does not finish off the bogeyman skulking just below the surface. Consider a horrible possibility: a new Judge Advocate General is appointed; for some reason, that individual has little appreciation for the role of appellate judges and opines that Judge X isn't "really one of us" or that a given opinion i[s] wrong. Later, that judge fails of promotion or receives an undesirable assignment. These alternatives are possible within the present structure. *That it seldom happens is not due to fail-safe mechanisms internal to the Uniform Code. Rather, success rests upon the fundamental decency and objectivity of incumbents at the star and flag level.*

Joseph W. Kastl, "*I've Got the Heebie-Jeebies*": *The Four Toughest Questions in Military Justice*, 38 Fed. B. News & J. 216, 217 (1991) (emphasis in original).

The approach taken by the court below (and, more recently, by the Navy-Marine Corps Court in *Mitchell*, —— M.J. ——) is cold comfort to military defendants. They are entitled to surer protection of judicial inde-

pendence than either the judges' personal courage and integrity or the Judge Advocate General's ability or willingness to discern that his best interest lies in preserving judicial independence, or his "fundamental decency and objectivity." Military personnel are entitled to have their due process rights rest on a firmer foundation than the varying personal confidence levels of career-officer judges that the rule against retaliatory transfer announced by the Court of Military Appeals will in fact be observed even if there are no effective procedures for detecting or proving violations and no viable sanctions even if there were. *Tumey v. Ohio,* 273 U.S. 510, 532 (1927); *see also Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 177 (1951) (Douglas, J., concurring). There is no reason to demand that those who bear arms in the service of the Nation must settle for promises rather than protection when it comes to judicial independence. As President Reagan said in the context of nuclear arms reduction, "trust, but verify."

Because a proper analysis shows that fixed terms are required under either *Matthews* or *Medina,* the only remaining question is whether something inherent in military justice precludes application of the normal rules for due process. As we explain below, the Court of Military Appeals was unable to point to any such special circumstances.

C. Fixed Terms of Office Are Not Precluded By Unique Needs of the Military and Do Not Entail Significant Fiscal or Administrative Burdens.

The unique needs of the armed forces must be considered when determining how the Constitution applies to military personnel. *E.g., Goldman v. Weinberger,* 475 U.S. 503 (1986); *Brown v. Glines,* 444 U.S. 348 (1980). No such needs preclude fixed terms of judicial office. Moreover, the unique circumstances of the military argue for, rather than against, the relief petitioners seek because the military personnel structure—including those who perform judicial duties—is pervasively hierarchical. Deference to superiors is integral to the military way of life. This renders it *more,* rather than *less,* urgent that uniformed judges have the protection of fixed terms.

The Navy has never argued that fixed terms would be a burden. Its only justification below—advanced in *Graf* —for failing to provide fixed terms was that courts-martial are ephemeral, *i.e.,* a new court-martial must be appointed for each case. This claim obviously overlooks the Courts of Military Review, which are standing bodies. Moreover, the argument is completely unrealstic as to the trial courts because the Navy maintains a standing trial judiciary with geographically-defined circuits, rules of court, docketing systems, and a constant flow of cases. The Court of Military Appeals chose not to dignify the Navy's theory by addressing it in its opinion in *Graf,* 35 M.J. 450.

Even in opposing certiorari, the government did not argue that military exigencies preclude fixed terms of office for military judges, thus abandoning the one justification it attempted below. This retreat requires that it defend on the more fundamental ground that due process tolerates reliance on at-will judges in *any* system of criminal justice. But the government also failed to offer any meaningful defense of this proposition, blandly noting that "[s]tates are free to select terms of office for persons who hold any such position." Graf Opp. 7. This formulation, of course, does not address whether the states are equally free to decide to give their judges *no* fixed term at all, as the military does.

For its part, the Court of Military Appeals also made no effort to defend the lack of fixed terms on practical grounds, and could point to no unique military needs that preclude fixed terms. Still the factors that have been looked to in the past when seeking to justify departures

from civilian norms [4] in no way detract from petitioners' due process position. These factors include "overriding demands of discipline and duty," *Burns v. Wilson,* 346 U.S. 137, 140 (1953), readiness, *Curry v. Secretary of the Army,* 595 F.2d 873, 877 (D.C. Cir. 1979), morale and "orderly processes." *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 22 (1955). While generally not included on these lists, cost has been considered a pertinent factor in due process analysis, although the cases recognize that achieving due process may cost money.

Readiness and flexibility would be unaffected by the introduction of fixed terms. Only about 3% of active duty judge advocates serve in general court-martial and Court of Military Review judicial billets. Many of them surely serve normal tours of duty. As a result, elevating normal tours into fixed terms would have no appreciable impact on personnel management flexibility. *Bozin v. Secretary of the Navy,* 657 F. Supp. 1463 (D.D.C. 1987); *see also* 2 Dep't of Defence, *The Military Justice Act of 1983 Advisory Commission Report* 1153 (1984) (letter from Lt. Col. Alves to Col. Thomas L. Hemingway, May 24, 1984) (three-year term sufficiently flexible for proper personnel management).

Due process would not be offended if exceptions were made for times of war or insurrection, *see Généreux v. Her Majesty the Queen,* 1 S.C.R. at 313 (1992); *Graf,* 35 M.J. at 466, mobilization, demobilization, and reductions in statutory authorized strength. This is in keeping with both the Court's willingness to acknowledge the role of military operational requirements and its commitment to careful scrutiny of operational necessity claims to ensure that they do not exceed or outlive their basis

[4] The burden is on the government to justify such variations. *E.g., United States v. Ezell,* 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams,* 1 M.J. 267 (C.M.A. 1976); *United States v. Knudson,* 4 U.S.C.M.A. 587, 591, 16 C.M.R. 161, 165 (1954).

in fact. Thus, in *Louisiana ex rel. Handlin v. Wickliffe,* 79 U.S. (12 Wall.) 173 (1870), the Court permitted the removal of a judge in the course of the military occupation of New Orleans, relying on wartime conditions not present in this case. Similarly, in *Duncan v. Kahanomoku,* 327 U.S. at 313, 326-28, 329-30, 337 (1946), the Court considered the progress of the Second World War in deciding whether martial law could still be justified in the Territory of Hawaii months and years after the Japanese attack on Pearl Harbor.

The interest in "orderly processes" is served by fixed terms which reduce uncertainty about personnel transfers. The military is expert at establishing systems; given its size and complexity, it has to be. There can be little doubt that the armed services would quickly make the arrangements needed to implement fixed terms. At that point, new "orderly processes" would be in place, and this particular consideration would drop out of the due process equation.

Procedural safeguards must be afforded "if that may be done without prohibitive cost," *Goss v. Lopez,* 419 U.S. 565, 580 (1975), although "it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert v. District of Columbia,* 948 F.2d 1327, 1335 (D.C. Cir. 1991), *citing Fuentes v. Shevin,* 407 U.S. 67, 90 n.22 (1972). Here, cost weighs in favor of petitioners' due process argument since fixed terms would, if anything, entail less frequent transfers. Of course, to the extent that the armed services already keep their judges in place for normal tours of duty, *see* 1 Gilligan & Lederer, *supra,* § 14-31.00, at 519 (1991), cost drops out as a factor.

Long before these cases, the Navy was willing to accept two-year terms of office for general court-martial and Court of Military Review judges. Thus, in response to a proposal by the Association of the Bar of the City of New York, *see* Ass'n of the Bar of the City of New

York, Comm. on Military Justice and Military affairs, *A Bill to Improve the Military Justice System* (1977), *discussed in* Eugene R. Fidell, *Judicial Tenure Under the Uniform Code of Military Justice,* 31 Fed. B. News & J. 327, 331 (1984), the Department of Defense's Joint-Service Committee on Military Justice supported a two-year term for Court of Military Review judges, but divided over the terms of office for trial judges. The Army favored "limited tenure after a probationary period, with provision for releasing an officer from judicial duties due to abolition of his position, or at his request, or upon his appointment as appellate judge." The Navy was willing to accept terms not to exceed two years. This seriously undermines any contention that the protection petitioner seeks would represent a substantial, much less an intolerable burden on the service.

Nations that share our legal traditions, as well as those that do not, have found it workable to afford military judges the protection of fixed terms. Thus, Canada, another federal union with common law traditions, recently addresesd the due process issue presented in this case. In *Généreux,* 1 S.C.R. 259 (1992), the Supreme Court of Canada agreed that fixed terms of office are required for court-martial judges to satisfy § 11(d) of the *Charter of Rights and Freedoms,* which provides that

> Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Canadian Court-Martial Appeal Court had earlier reached the same conclusion in *R. v. Ingebrigtson,* 61 C.C.C.3d 541 (C.M.A.C. 1990). Rather than appealing *Ingebrigtson,* the Ministry of Defense modified the *Queen's Regulations and Orders* ("QR&O") (Canada's equivalent of the *Manual for Courts-Martial*) to provide that officers performing judicial duties shall be appointed for "a fixed term" which "shall normally be four years

and shall not be less than two years." QR&O art. 4.09. Such officers performing judicial duties may be removed before the expiration of their term only for just cause, upon the officer's written application, acceptance of a promotion, or retirement. *Id.* arts. 4.09(6), 11.354(5). *Généreux* noted these changes with approval. *Graf,* 35 M.J. at 466.

The legal traditions of the former Soviet Union are of course far removed from those of the common law countries. This makes it all the more remarkable that Soviet military judges were protected by fixed terms of office. Jody M. Prescott, *Soviet Military Justice and the Challenge of Perestroika,* 123 Mil. L. Rev. 129, 131-32 (1989); Michael N. Schmitt & James E. Moody, *The Soviet Military Justice System,* 34 A.F. L. Rev. 1, 28 & n.235 (1991). With the advent of *perestroika,* the term of office was extended from five years to ten. *Id.* at 28 & n.238; Michael N. Schmitt, *The Judicial and Non-Judicial Punishment Systems of the Soviet Armed Forces,* 4 J. Sov. Mil. Studies 87, 102 & n.50 (1991).

If nations with such divergent legal traditions and military postures as these can accommodate fixed terms for mitary judges, it is difficult to treat seriously the notion that there is anything inherent in military affairs that precludes them for this country's soldier- and sailor-judges.

In summary, on one side of the scale is petitioners' compelling interest in being tried before an independent judge before being sent to prison and subjected to the lifetime stigma of a punitive discharge. On the other side, so far as can be determined from *Graf* or the decisions below, there is nothing. The nature of the military command structure adds to the need for judicial officers protected by fixed terms of office. Fixed terms of office would substantially bolster judicial independence and public confidence in this important system of criminal justice, without imposing significant administrative burdens. Due process mandates this protection.

D. Neither This Court Nor Congress Has Determined That the Armed Forces' Practice of Not Affording Judges the Protection of Fixed Terms of Office Comports With Due Process.

The Court of Military Appeals claimed in *Graf*, 35 M.J. 450, that this Court's failure in *Toth*, 350 U.S. 11, and *Palmore v. United States*, 411 U.S. 389 (1973) to disapprove the military's at-will arrangements for judges represents a "deafening" silence. *Graf*, 35 M.J. at 464. The point is not well taken. It disregards what was at issue in those cases, as well as the terms of the UCMJ that were in effect when *Toth* was decided. *Toth* was decided long before enactment of the Military Justice Act of 1968, which created the military bench. It regarded the absence of terms of office for the law officers who at the time presided at general courts-martial not as a system *strength*, but as a *shortcoming* which militated *against* the exercise of court-martial jurisdiction in the circumstances there presented.

For its part, *Palmore* rejected a claim that the Fifth Amendment requires *life* tenure for the fixed-term judges of the Superior Court of the District of Columbia. 411 U.S. at 410; *see* D.C. Code § 11-1502 (1981 ed.) (15-year terms). The case did not address the situation where judges have no fixed term at all, and its passing reference to the military justice system, citing *Toth*, cannot be seriously taken as a ruling on the issue.

The government relies on what it describes as "Congress's decision not to grant tenure to military judges." Graf. Opp. 10. Congress has made no such decision. The government cites nothing to indicate that Congress made any specific determination as to the need for terms of office when it created the military bench. Congress later commissioned a study of the matter, among others, Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b)(1)(D), 97 Stat. 1404, but has yet to hold a hearing on the subject. There are divers plausible explanations for the

lack of congressional action, including "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting). As a result, it is improper to draw inferences from it one way or the other. *E.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Girouard v. United States*, 328 U.S. 61, 69 (1946). In any event, even if Congress's inaction were properly viewed as a "decision" to approve the services' practice of requiring military judges to serve without the protection of fixed terms, that would not absolve this Court of its duty to enforce the Constitution's guaranty of due process.

In opposing certiorari, the government also advanced a superficially appealing textual argument which, upon analysis, proves to be entirely untenable. It suggested that since the Constitution elsewhere prescribes particular terms of office for the President, Vice President, Senators, Congressmen and Article III judges, due process cannot make any terms-of-office demands for other officials such as military judges. Graf Opp. 6 & n.4. But if the Constitution were read in the cramped fashion suggested by this *expressio unius* argument, none of the specific guarantees of the Bill of Rights would ever have been applied to the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Nor would Fifth Amendment due process have been found to contain an equal protection component, since that concept appears *in haec verba* only in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, because the Contract Clause applies on its face only to the states, the government's mechanical approach would preclude finding an analogous restriction on the federal government in Fifth Amendment due process. Yet the cases recognize such a restriction, even though the Framers explicitly refused to subject federal legislation impairing private contracts to the literal re-

quirements of the Contract Clause. *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 & n.9 (1984) (proposal to extend Contract Clause to federal government failed for lack of a second at 1787 Convention).

In conclusion, due process requires military trial and appellate judges be afforded the protection of fixed terms.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Military Appeals should be reversed and the cases remanded for further proceedings before military trial and appellate judges appointed in accordance with the Appointments Clause for fixed terms of office.

Respectfully submitted.

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